



JURISPRUDENCE ON REGIONAL AND INTERNATIONAL TRIBUNALS DIGEST

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PREFACE

In this era of globalisation, the law is slowly but surely taking the central stage. Unlike before, it is no longer force in the form of gunboat diplomacy or ideology as represented by cold war which determines the right and wrong at international level. It is the law.

The choice of the tribunals whose work is digested is wide and rich. There are cases from one global tribunal (the International Court of Justice); one regional tribunal (the Inter-American Court of Human Rights); two sub-regional tribunals (the East African Court of Justice and the COMESA Court of Justice); and two ad hoc tribunals (the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda). The selected cases cover a variety of subjects in international law from international trade to international humanitarian law. They deal with both issues of substance as well as procedure.

Of special interest in this digest is the work of the East African Court of Justice. This court, hitherto thought to be a dormant and useless part of the East African Community set-up has of late surprised many. After almost six years of inaction, it has recently produced earth-shaking decisions. These bold rulings and judgments have caught governments of East African Community member States by surprise and thus forcing them to make a clear choice between respecting rule of law or resorting to illegality. Unfortunately, they have chosen the later. They have resorted to high-handedness – threatening judges, ignoring rulings – all in the name of sovereignty! This is an indication of the effects of a good international tribunal which is composed of people of integrity – bold spirits who are ready to stand by justice even if heavens fall. The judges of the East African Court of Justice are doing the region proud.

The arrival of this Digest is more than timely. It is *inter alia*, a clear evidence that both regional and international tribunals are doing a fantastic work and enormously contributing to the development of international law. In addition, it is making the work from the African continent which is rarely available to the rest of mankind now accessible to the wider world. This is an important and well-conceived initiative for which the East Africa Law Society should be saluted.

Chris Maina Peter
Professor of Law
University of Dar es Salaam, TANZANIA

INTRODUCTION

For a long time states committed themselves to international legal obligations that they did not, with equal enthusiasm, commit themselves to enforcement. The concept of state sovereignty was the shield that many states invoked to keep at bay attempts by the international community to measure their compliance with international legal obligations.

The recent past has seen the fashionability of regional trading and administrative blocks. With the emergence of these blocks have emerged institutions for dispute resolution. This accounts for the existence of such institutions such as the East African Court of Justice, the court for the Common Market for Eastern and Southern African States, the African Commission of Human and Peoples' Rights, the African Court of Human and Peoples' Rights, the Inter-American Court of Human Rights, the European Court of Human Rights among other regional tribunals.

The changing nature of interstate relations has also seen the emergence of international tribunals like the International Court of Justice, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Criminal Court.

These courts have varying approaches to procedural aspects of the questions that they are confronted with. Further, the jurisdictions of these tribunals vary depending on the instruments establishing them and other general principles of international law.

The emergence of these tribunals has further had the desired and enriching effect of adding value and giving meaning to the dry letter of international law. Areas of international law such as general international law, principles of regional integration, international human rights, international humanitarian law, international criminal law, international trade law, international environmental law, international law of the sea, international space law among other branches of law have benefited tremendously from the reasoning advanced by these tribunals on a case by case basis.

Practitioners of law cannot evade the challenges attendant to practicing before these tribunals. It is against the background of this inescapable challenge that this digest becomes the more relevant. Though not covering all aspects of international law as discovered by various tribunals, it is a material addition to the resources of international law available in the East African region.

The digest covers all decisions so far made by the East African Court of Justice. The digest, thereafter samples two decisions from the COMESA court, two decisions from the Inter-American Court of Human Rights, two decisions from the International Court of Justice, two decisions from the International Criminal Tribunal for the former Yugoslavia and two decisions from the International Criminal Tribunal for Rwanda. Space is many times a highly limiting factor. That is why diverse reasoning from other cases determined by the same tribunal as well as the jurisprudence from other tribunals like the African Commission on Human and Peoples' Rights and the European Court of Human Rights have been given a wide berth. It is hoped that by instrumentality of sequels, such inadequacies will be addressed.

Ongoya Z Elisha, Advocate

Editor

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MWATELA AND OTHERS V EAST AFRICAN COMMUNITY

THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

CASE NUMBER 1 OF 2005

[1] East African Community – Jurisdiction – Whether the Council had jurisdiction over the Assembly – Whether there was any restriction on the kind of bills that could be brought before the Assembly.

[2] East African Community – Legislative procedure – Whether there was any restriction on private members bills – Whether private members bills could be taken over and withdrawn by the Council of Ministers.

[3] East African Community – Words and Phrases – “Council of Ministers” – What was meant by Council of Ministers – Whether Attorneys General of Kenya and Tanzania were Ministers in their respective governments – Whether a sectoral Council could delegate its powers to non-Ministerial government representatives.

Editor’s Summary

The applicants made a reference to the East African Court of Justice under article 30 of the Treaty for the Establishment of the East African Community (the Treaty). The dispute arose when the Council of Ministers (the Council) decided that policy-oriented Bills, such as those having an implication on the member states’ sovereign interest and on the Budget ought to be submitted to the East African Assembly (the Assembly) by the Council. The Council therefore assumed responsibility for four private members bills pending before the Assembly, and the Assembly twice agreed to postpone consideration of the Bills. The Council appointed a Sectoral Council on Legal and Justice Affairs (the Sectoral Council) to which the Attorneys General of the three East African Countries were to be the members. The Sectoral Council considered the aforesaid pending bills and made a decision to withdraw and/or amend the different bills. At the meeting in which this decision was taken (the material meeting), the Attorneys General of Kenya and Tanzania were represented by their deputies.

Three issues arose for determination, namely whether the Sectoral Council had been properly established and constituted, what was the status of the purportedly-withdrawn bills and what relationship the Council had with the Assembly in regards to legislation.

Held – Under the Treaty, the Council of Ministers could establish a Sectoral Council of Ministers from all three East African states to deal with any relevant policy issue. However, under the laws of the East African states, only the Attorney General of Uganda (through the Constitution) and of Kenya (through the Interpretation and General Provisions Act) were considered Ministerial-level officials. Since the Attorney General of Tanzania was not a Minister under Tanzania law, he could not validly constitute the representative of Tanzania in the Sectoral Council. Under the doctrine of prospective annulment, the Sectoral Council was annulled but without retrospective effect. *Defrenne v Sabena* [1981] All ER 122; *Linkletter v Walker Warden* 381 US [1965] 618; *Golak Nath v The State of Punjab* [1967] AIR 1643 followed.

Further, the Sectoral Council powers could only be exercised by Ministers, and not by subordinates or delegated representatives. Hence Kenya and Tanzania were not properly represented in the material meeting. That meeting was therefore a nullity as it lacked a quorum of representatives from all East African states. The decisions arrived at therein were also a nullity.

Under the Treaty, bills pending for consideration before the Assembly could only be withdrawn by the mover with leave of the House or the Committee. The Council therefore had no authority to withdraw private members bills pending before the Assembly. The Council, the Summit, the Court and the Assembly of the East African Community had separate and independent jurisdictions. The Assembly could therefore consider any matter within its mandate. However, the Assembly's general power of legislation was limited by article 59 restrictions. One of the restrictions prohibits the Assembly from considering a bill that does not relate to the general functions of the Community or does not relate to a matter in respect of which an act of the Community can be enacted. This includes matters relating to the exclusive sovereignty of the Partner States. Costs of the application would be awarded to the applicants limited to relevant disbursements.

Cases referred to in judgment

("A" means adopted; "AL" means allowed; "AP" means applied; "APP" means approved; "C" means considered; "D" means distinguished; "DA" means disapproved; "DT" means doubted; "E" means explained; "F" means followed; "O" means overruled)

East Africa

Uganda v Commissioner of Prisons ex parte Matovu [1966] EA 645

United Kingdom

Defrenne v Sabena [1981] All ER 122 – F

United States

Linkletter v Walker Warden 381 US [1965] 618 – F

India

Golak Nath v The State of Punjab [1967] AIR 1643 – F

Judgment

KEIWUA, MULENGA, RAMADHANI, MULWA AND WARIOBA JJ: This is a reference under article 30 of the Treaty for the Establishment of the East African Community (the Treaty), instituted on 7 December 2005 by three Members of the East African Legislative Assembly, namely: Calist Andrew Mwatela, Lydia Wanyoto Mutende and Isaac Abraham Sepetu (the applicants), in an application by Notice of Motion pursuant to rules 1(2) and 20 of the East African Court of Justice Rules of Procedure (the Court Rules). The respondent is the East African Community which under article 4 of the Treaty, is a body corporate with *inter alia* power to sue and be sued in its own name.

In their application, the applicants challenge the validity of the meeting of the Sectoral Council on Legal and Judicial Affairs (the Sectoral Council) held on 13 to 16 September 2005 and the decisions taken by the said meeting in relation to Bills pending before the East African Legislative Assembly (the Assembly), and they seek an order by the Court that the report of the Sectoral Council meeting held on 13 to 16 September 2005 is null and void *ab initio* and all decisions, directives and actions contained in or based on it are null and void.

In the response to the application the respondent opposes the application and supports the validity of the Sectoral Council's impugned decisions. Both parties to the application opted to rely on the pleadings and the supporting affidavits and the reports and correspondence which were annexed thereto and so no oral evidence was adduced.

It was common ground that what gave rise to the dispute were four Private Member's Bills, which in November 2004 were pending legislation in the Assembly. The Bills are the East African Community Trade Negotiations Bill (2004) (the Trade Negotiations Bill), The East African Community Budget Bill (the Budget Bill), The East African Immunities and Privileges Bill (the Immunities and Privileges Bill) and The Inter-University Council for East Africa Bill (the Inter-University Council Bill).

The Council of Ministers (the Council) at its ninth meeting held on 24 November 2004, decided that policy oriented Bills such as those that have implications on the Partner States' sovereign interest and on the budgetary aspect of the Community, ought to be submitted to the Assembly by the Council under article 14(3)(b) of the Treaty as opposed to being submitted as Private Member's Bills under article 59 of the Treaty. The Council therefore decided to assume responsibility for the four pending Bills for consideration and submission to the Assembly. We were not able to ascertain the extent of consultation that took place between the Council and the Assembly before the Council decided to assume responsibility over the Bills. But we found out that in November 2004 and again in February 2005, the Chairperson of the Council requested and the Assembly agreed to postpone debate on the Trade Negotiations Bill.

During the budget debate in the May 2005 session of the Assembly, some issues connected with the pending Private Member's Bills were raised as a result of which the Chairperson of Council proposed a joint meeting between the Assembly and the Council.

Before that meeting was held, the Council held its 10th meeting on 4 to 8 August 2005, at which it decided that development of legislation on trade negotiation be stayed pending conclusion of a consultancy study into all implications of such legislation, and that the Inter-University Council Bill be submitted to the Sectoral Council for legal input and subsequent submission to the Assembly.

The joint meeting, referred to as the High Level Retreat, was held at Ngurdoto Mountain Lodge on 10 and 11 August 2005. At the conclusion of the meeting, the Chairperson undertook that the revised Inter-University Council Bill and the Immunities and Privileges Bill would be submitted to the Assembly session due to start on 19 November 2005. However the said Bills were not submitted to the Assembly as undertaken by the Chairperson because the Sectoral Council decided otherwise.

The Sectoral Council held a meeting on 13 to 16 September 2005, at which it decided that protocols, within the meaning of article 151 of the Treaty, rather than legislation enacted by the Assembly, were sufficient to provide for the Inter-University Council and for providing immunities and privileges for the Community. Apparently a Protocol for the establishment of the Inter-University Council was concluded on 13 September 2002, and had been ratified by Tanzania and Uganda and only awaited ratification by Kenya; and a draft Protocol on immunities and privileges for the Community, its organs and institutions and persons in its service was in process of consultation and had been considered by the Permanent Secretaries in February 2005.

The Sectoral Council observed that the contents of the Bills were respectively similar to the provisions of the said Protocols and accordingly it decided to advise the Council to withdraw the two Bills from the Assembly. In furtherance of these decisions, the Sectoral Council (a) urged that the Ministers of the Partner States responsible for Foreign Affairs should urgently meet to consider and conclude the Protocol on Immunities and Privileges so as to bring it into force by 1 January 2006 and (b) requested that the Chairperson of the Council should inform the Speaker of the Assembly of these decisions.

Two things followed. On 16 September 2005 the Secretary General of the Community wrote to the Speaker informing him, *inter alia*, that the Council had decided to withdraw from the legislative business of the Assembly the Immunities and Privileges Bill and the Inter-University Council Bill. Secondly according to the Official Report of Proceedings of the Assembly, on 27 September 2005, Mr John Koech, a Member of the Council, apparently on behalf of the Chairperson, made a Ministerial Statement from the floor of the Assembly, recalling the Council decision at its ninth meeting held on 24 November 2005, to assume responsibility of the four Bills, its subsequent request to the Speaker to defer consideration of the Bills until policy input by the Council had been finalized and also gave an up date to the Assembly on the current position of each Bill.

In a nutshell he said that after receiving comments by the Partner States on the Bills and subjecting the Bills for appropriate policy input by the Sectoral Council, the Council was requesting that development of legislation on trade negotiations be stayed pending conclusion of consultation with Partner States on a consultancy study report; and that the Community Budget Bill be stayed pending submission of the Partner States' comments on it to relevant Sectoral Committees.

He also disclosed that it was the view of the Partner States that both the Immunities and Privileges Bill and the Inter-University Council Bill be withdrawn from the Assembly because in either case a Protocol within the meaning of article 151 of the Treaty is sufficient. The Ministerial statement was not well received and after some uncomplimentary reactions, the Assembly resolved to have a substantive debate on the Ministerial statement at sometime in the future. However, no Motion was subsequently moved to initiate a debate on the matter. Instead, on 7 December 2005, the applicants filed this application which the respondent opposed as we indicated earlier.

At the hearing, the applicants were represented by a team of counsel led by Professor FE Ssempebwa and consisting of Mr DW Ogalo, Mr M Marando, Mr MS Kaggwa and Mrs SN Bagalaaliwo while the respondent was represented by a team led by Mr W Kaahwa, Counsel to the Community, and consisting of Ms Makena Muchiri, Deputy Chief State Counsel (Kenya), Mr SN Tuimising, Senior State Counsel (Kenya), and Ms Isabelle Waffubwa, Legal Officer of the Community. The East African Law Society, with leave of the Court, appeared in the application as

amicus curiae and was represented by Mr Tom Nyanduga, President of the Society, Mr Don Deya, Chief Executive Officer of the Society, Mr Alex Mgongolwa and Mr Nassoro Mohammed who are members of that Society.

1. THE ISSUES

A scheduling conference in terms of rule 52 of the Court Rules was held on 15 June 2005 at which time two sets of issues were submitted by the parties. With the help of the Court the issues were merged as follows:

- (1) Whether the meeting held between 13 and 16 September 2005 was a meeting of Sectoral Council on Legal and Judicial Affairs as envisaged in the Treaty?
- (2) Whether Protocols are legally sufficient in regard to immunities and privileges and for the formal establishment of Inter-University for East Africa Council so as to render the enactment of the Community's Acts for those purposes unnecessary.
- (3) Whether the Inter-University Council for East Africa Bill 2004 and the East African Community and Privileges Bill 2004 were properly withdrawn from the Assembly.
- (4) Whether or not under article 59 a Member could move in the Assembly the East African Community Trade Negotiations Bill 2004, East African Immunities and Privileges Bill 2004, and the Inter-University Council for East Africa Bill 2004.
- (5) Whether the decisions of the Council are binding on the Assembly under article 16 of the Treaty.
- (6) Whether the introduction of a Bill under rule 64(5) of the Assembly Rules of Procedure constitutes the initiation of the legislative process under those Rules.
- (7) Whether or not the decision taken by the Council at its 10th meeting held on 4 to 8 August 2005 on the East African Trade Negotiations Bill 2004 is lawful and in accordance with the provisions of the Treaty.
- (8) Whether or not the decision taken by the Sectoral Council at its meeting on 13 to 16 September 2005 on the East African Community Immunities and Privileges Bill 2004 and the Inter-University Council for East Africa Bill, 2004 is lawful and in accordance with the provisions of the Treaty.
- (9) Whether the decisions of the Sectoral Council are binding on the Assembly.
- (10) Whether the Council followed the rules of the House to withdraw Bills.
- (11) Whether the Council met to make the decision that was communicated to the Speaker by the Secretary General.
- (12) Whether the decision of the Sectoral Council was consistent with its mandate.

- (13) Whether the Sectoral Council on Legal and Judicial Affairs by virtue of their decisions taken on 13 to 16 September 2005 purported to discharge functions bestowed upon the Assembly.
- (14) Whether the Council and Sectoral Council on Legal and Judicial Affairs have usurped the powers of the Counsel to the Community, Council of Ministers and the East African Court of Justice as provided under the Treaty.
- (15) Whether the decisions of the Council and those of the Sectoral Council curtailed or interfered with the Assembly's functions.
- (16) Whether the withdrawal of the Bills by the Council of Ministers as an organ of the Community is subject to the Assembly's Rules.
- (17) Whether it is obligatory for Council of Ministers to meet so as to communicate the decisions of the Sectoral Council to the Assembly having directed the Chairperson of the Council through the Secretary General.
- (18) Whether the Partner States have the Prerogative on who should attend organ meetings like those of the Council and Sectoral Council.

In their respective addresses to the Court, counsel argued the issues in clusters because they realized, quite correctly in our view that many of the issues touched on the same or related points. Unfortunately they did not configure the clusters uniformly and so in considering and determining the issues in this judgment we are not able to follow the Order counsel followed in addressing the Court. We find it more expedient to consider the issues under the following broad headings:

- (a) Establishment of the Sectoral Council and its meeting of September 2005.
- (b) Status of the contentious Bills.
- (c) Relationship of the Council and the Assembly on legislation.

The applicants' challenge of the validity of the Sectoral Council is two pronged. First they contend that the Sectoral Council was not established as envisaged under, or in accordance with the provisions of the Treaty. Secondly, they contend that the meeting held on 13 to 16 September 2005 was not a properly constituted meeting of the Sectoral Council. The two contentions are grounded on:

- (a) the provisions of article 14 of the Treaty;
- (b) the decision of the Council at its 1st meeting to set up the Sectoral Council;
- (c) the attendance list of the meeting of the Sectoral Council held on 13 to 16 September 2005.

In his submissions on the composition of the Sectoral Council, Professor *Ssempebwa* pointed out that the Treaty prescribes membership of the Council to consist of Ministers responsible for regional co-operation in each Partner State "and such other Ministers of Partner States as each Partner State may determine"; and that

under article 14, the Treaty empowers the Council to establish “from among its members” Sectoral Councils to deal with matters that the Council may delegate or assign to them. He argued that when in its first meeting held on 8 to 13 January 2001, the Council adopted a recommendation to constitute meetings of Attorneys-General of the Partner States into the Sectoral Council on Legal and Judicial Affairs, it acted *ultra vires* its said power because it thereby established a body that was not composed of members of the Council.

Professor *Ssempebwa* further submitted that the Council was not empowered to establish a Sectoral Council from among persons other than its members. He contended that save for the Attorney-General of the Republic of Uganda who is designated a Minister under the National Constitution, the Attorney-General of the Republic of Kenya and the United Republic of Tanzania are not similarly designated Ministers, and consequently for the purposes of the Treaty those two were not members of the Council.

In the alternative, he submitted that even if it is held that the Sectoral Council was lawfully established, the meeting held on 13 to 16 September 2005 was not a lawfully constituted meeting of the Sectoral Council. He referred to the report of that meeting in which it is indicated that only the Attorney-General of Uganda attended in person while the Attorney-General of Kenya was represented by the Solicitor General and the Attorney-General of Tanzania was represented by the Deputy Attorney-General/Permanent Secretary, Ministry of Justice and Constitutional Affairs, both of whom were clearly not Ministers.

Professor *Ssempebwa* referred to two principles of interpretation of treaties. One is that the words of a treaty must be given their natural meaning unless that would lead to some unreasonable or absurd result. The other is the principle of effectiveness which is that in interpreting a Treaty the Court must ascertain its objective and give effect to it. He submitted that the objective of the Treaty in creating the Council was to create a strong policy making organ of the Community composed of persons with authority from the Partner States to make binding decisions. The Treaty does not leave room for bureaucrats taking over decision-making at that level.

On the other hand, in his opening address at the hearing, *Mr Kaahwa*, the learned Counsel to the Community, while acknowledging that the Treaty is the grundnorm of the integration process for the Community, from which all other legal instruments in the Community derive, subsist and draw legality, and whose provisions must be strictly adhered to, stressed that the Treaty establishes a framework of organs and institutions entrusted with specific mandates whose execution must be guided by adherence to the rule of law and the principles of harmonization. He also stressed that the Community functions on basis of consensus as its survival depends on goodwill of the Partner States and harmonious

working relationship with the organs and institutions and on their agreeing on all aspects of the Community's development. He urged the Court to have these matters in mind in answering the issues before it.

In the response to the application, the respondent maintains that the Sectoral Council meeting held on 13 to 16 September 2005 was validly convened and constituted and that its decisions are valid. In reply to Professor *Ssempebwa's* first contention, *Mr Kaahwa* argued at length that the Attorneys-General of Kenya and Tanzania fit within the Treaty definition of "Minister" and are therefore potential members of the Council.

In the course of the submissions *Mr Kaahwa* as Counsel to the Community informed the Court from the bar that membership of the Council is not static. In practice, the full membership is only ascertainable at the time of meetings, when each Partner State determines its representation depending on the agenda of the particular meeting. He argued that by virtue of article 13 of the Treaty, each Partner State retains an executive prerogative to designate its representative(s) on the Council in addition to its Minister responsible for regional co-operation. He submitted that the exercise of that prerogative may not be inquired into by the Court and cited the case of *Uganda v Commissioner of Prisons ex parte Matovu* [1966] EA 645.

He also submitted that the prerogative has been preserved by the Council Rules of Procedure made under article 15(2) of the Treaty. He maintained that in due exercise of that prerogative, Kenya and Tanzania designated their respective Solicitor-General and Deputy-Attorney-General/Permanent Secretary to represent their Attorneys-General at the meeting of the Sectoral Council, notwithstanding that they are not Ministers.

In our view, *Professor Ssempebwa's* first contention is a departure from the pleadings in this Reference. Throughout the pleadings what was in issue was the composition of the meeting held on 13 and 16 September 2005. All the averments in part 'A' of the Reference are concerned with the session of the Sectoral Council held on 13 to 16 September 2005. Indeed when the respondent pleaded in paragraph 5 of its response that the Council had established the Sectoral Council at its first meeting, the applicants retorted in paragraph 3 of their Reply to the response thus:

"With regard to paragraph 5 of the response, the applicants take note that the Council may have established Sectoral Councils as resolved in pages 28-34 of Annex 'A' to the response. The applicants aver, however, that the establishment of such Sectoral Council does not touch on the issues raised in the Reference as the individuals who sat on 13 to 16 September 2005 are not members of the Council under article 14(3)(i) of the Treaty."

As a result, issue one as framed, expressly relates to that session and we take it that issue eighteen also relates to the same session. However, the question whether the

Sectoral Council was established in accordance with the provisions of the Treaty is a legal one and was canvassed fully. Therefore, we have to determine it though it did not feature in the pleadings. We agree with the counsel for the applicants that the Council is empowered under article 14 to establish Sectoral Councils from among its members only.

Membership of the Council under the same article is restricted to Ministers and the Treaty defines a Minister as follows:

“Minister’ in relation to a Partner State, means a person appointed as a Minister of the Government of that Partner State and any other person, however entitled, who, in accordance with any law of that Partner State, acts as or performs the functions of a Minister in that State.”

According to the record of the first meeting of the Council held on 8 to 13 January 2001 the delegations of the Partner States included their respective Ministers responsible for regional cooperation and several others of divers portfolios. We take it that those other Ministers were the ones each Partner State designated as Members of the Council under article 13. We note that the delegation of Uganda included the Attorney General but those of Tanzania and Kenya did not.

It was at that Meeting that the Council agreed to designate the Meeting of the Attorneys-General of the Partner State as the Sectoral Council though there is no indication that the Attorneys-General of Kenya and Tanzania were Members of the Council.

Furthermore, although the Attorney-General of Uganda is, by virtue of article 119 of the Constitution of the Republic of Uganda, a Cabinet Minister and consequently qualified to be a Member of the Council, the Attorney-General of Tanzania is not. From 7 our reading of article 54(1) and (4) of the Constitution of the United Republic of Tanzania the Attorney-General of Tanzania is not a Minister. In the case of Kenya, however, though the Constitution does not designate the Attorney-General as a Minister, the Interpretation and General Provisions Act includes the Attorney-General in the definition of a Minister. On the basis of that law it appears to us that for the purposes of the Treaty the Attorney-General of Kenya is a Minister as “a person who in accordance with a law of [Kenya] acts as or performs the functions of a Minister in [Kenya]”.

So, for purposes of the Treaty the two Attorneys-General, of Kenya and Uganda, are Ministers. However, for the Sectoral Council to be properly constituted it must comprise the representatives of all Partner States. This is underlined by rule 11 of the Rules of Procedure for the Council of Ministers which provides:

“The quorum of a session of the Council shall be all Partner States representation.”

This must apply to the Sectoral Councils since the decisions of the Sectoral Councils are deemed to be those of the Council of Minister under article 14(3)(i) of the Treaty. In the circumstances we find that the establishment of the Sectoral Council was inconsistent with the provisions of article 14(3)(i). However, since the purported Sectoral Council has been in place from 2001 and by now has, undoubtedly made a number of decisions, which would be unwise to disturb, we are of the considered opinion that this is a proper case to apply the doctrine of prospective annulment. We order that our decision to annul the Sectoral Council shall not have retrospective effect.

We think that the doctrine of prospective annulment, which has been applied in various jurisdictions, is good law and practice. See The Court of Justice for European Community in *Defrenne v Sabena* [1981] All ER 122; US Court of Appeals fifth Circuit in *Linkletter v Walker Warden* 381 US [1965] 618; and the Supreme Court of India in *Golak Nath v The State of Punjab* [1967] AIR 1643.

As for the second contention by Professor *Ssempebwa*, we note from Annex 'A' to the Reference, which is a report of the meeting of the Sectoral Council on Legal and Judicial Affairs held on 13 to 16 September 2005, that the participants were the Attorney-General/Minister of Justice and Constitutional Affairs of Uganda, the Deputy Attorney-General/Permanent Secretary, Ministry of Justice and Constitutional Affairs of Tanzania representing the Attorney-General and the Solicitor General of Kenya also representing the Attorney-General. However, by the Treaty the Partner States bound themselves in article 13 and 14 to be represented in the Council by their respective Ministers responsible for regional cooperation and other Ministers only and thereby delimited the prerogative of a Partner State in determining its representation on the Council. In the circumstances the decisions in *Uganda v Commissioner of Prisons ex parte Matovu (supra)* is not applicable to the facts of this case.

We note that the Treaty does not provide for the members of the Council or Sectoral Council to be represented at meetings by non-members. We think that this was deliberate to avoid distortion of the elaborate structural hierarchy of representation of the Partner States at the different levels in the organizational framework of the Community. Clearly if members of the Co-coordinating Committee, which reports to Council are allowed to represent members of the Council or the Sectoral Council at their meetings, the objective of separation of functions of the two organs would be defeated.

We therefore do not see any justification for the respondent's attempts to make in roads into the very clear words of article 13 of the Treaty that, Ministers of the Partner States can appoint persons who are not Ministers to attend meetings of Sectoral Councils or those of the Council purportedly on their behalf. It is not in

dispute that the Deputy Attorney-General of Tanzania and the Solicitor-General of Kenya are not members of the Council.

We would also like to dispose of the attempt to confuse the purport of article 15(2) of the Treaty by reading into it a stipulation that discretion still remains in the Partner States to send to the meetings of Council and those of Sectoral Councils persons who are not Ministers contrary to the requirement of article 13 of the Treaty. Article 15(2) is concerned with meetings of the Council and determination of procedure at those meetings. The Council Rules define the expression "Partner State representatives/representation" to mean a Minister designated to represent such a State in the meetings of the Council. We do not therefore see how article 15(2) and the Council Rules can be relied upon to show that there is a discretion still left for the Partner States to send persons who are not Ministers to the Council or Sectoral Council meetings.

That argument was advanced in an effort to bolster the issue as to whether it is the prerogative of the Partner States to designate such persons as they deem fit to represent them at lawfully convened meetings of either the Council or the Sectoral Council. It is quite clear that the formulation of Council rules has followed faithfully the provision of article 13 of the Treaty and it is not understood in what manner whatsoever, the Council Rules can be said to permit representation at those meetings by persons other than those expressly determined in strict compliance with article 13 of the Treaty. We therefore have no hesitation in reiterating that the meeting of 13 to 16 September 2005 was not a lawful meeting of a Sectoral Council and that the decisions it handed down in respect of the two Bills was not valid decision of the Sectoral Council.

Before we conclude on this aspect of the case, there is a matter to which we would draw attention that though the composition of the Council is established under article 13 of the Treaty, the total membership is not readily ascertainable, since it is only the membership of Ministers responsible for regional co-operation which is static and ascertainable. We were informed during arguments that membership of additional Ministers is determined by the agenda of a particular meeting of the Council. We would have thought that a more transparent way of knowing the composition of Council.

Members should have been evolved and put in place by now. This is good sense and good law since it will avoid uncertainty which usually degenerates into disputes such this one before the Court.

Having held, as we have, that the meeting was not a lawful meeting of Sectoral Council on legal and Judicial Affairs and that the decisions of the meeting was not a lawful meeting of a Sectoral Council on Legal and Judicial Affairs and that the decisions of the meeting were ipso facto invalid, it is unnecessary to consider if the said decisions are consistent with its mandate (issue twelve) and binding on the

Assembly (issue nine) and whether the Sectoral Council purported to discharge the functions of the Assembly (issue thirteen) or usurped the powers of the Council, the Court and/or Counsel to the Community (issue fourteen). We also find that it would be futile to discuss whether the council met and whether it was obligatory for it to meet in order to make the decisions which were communicated to the Speaker by the Secretary General (issues eleven and seventeen). In any case it is apparent from the affidavit of Amanywa Mushega, the then Secretary General that the decisions he communicated to the Speaker were made by the purported Sectoral Council meeting alone.

We would also recall the fact that the issue as to whether Protocols are legally sufficient to render legislation unnecessary (issue two) was one of those decisions of the meeting of the Sectoral Council held on 13 to 16 September 2005 which meeting, we have found elsewhere in this judgment, not to have been held as required by the Treaty. In view of that finding, this Court would not like to go into that question of sufficiency or otherwise of Protocols because to do so would be to encroach onto the jurisdiction of the Assembly.

It is also obvious that because they are invalid, the decisions of that meeting cannot be deemed to be decisions of the Council under article 14(3)(i) of the Treaty. In his letter to the Speaker, the Secretary General deemed them to be Council decisions because he assumed wrongly that they were valid. In the Ministerial Statement to the Assembly, Mr John Koech, did not give as a reason for withdrawal or stay of the Bills that they were decisions of the Council. In respect of two Bills he said Council was requesting for postponement and in respect of the other two he asserted that it was the view of the Partner States that they should be withdrawn.

Issues three, six, ten and sixteen concern the introduction and withdrawal of Bills from the Assembly. The debate in the Assembly is contained in the Hansard of 27 September 2005 when the Speaker directed that it was up to the owners of the Bills, to decide whether to continue with the Bills in the Assembly or let the Council takeover the Bills. Thereupon the issue was shelved for debate on a future occasion. We would here refer to *Mr Kaahwa's* helpful concession on behalf of the respondent that the Assembly Rules also bind the Members of the Council who are Members of the Assembly.

We also see that under article 59(1) of the Treaty any Member of the Assembly may introduce a Bill. This shows that the Council does not have exclusive legislative initiative in the introduction of Bills in the Assembly. In that connection, we appreciate the difficulty faced by the Assembly upon receipt of the letter by the Secretary General which made it quite clear that the matter in controversy between the Assembly and the Council had reached an impasse and had to come to Court for the opposing views on the interpretations of the Treaty to be resolved. Mr Marando drew our attention and we agree with him, and since it was also

conceded by the respondent in argument before us, that the Inter-University Bill as well as the Immunities and Privileges Bill had undergone the first reading, and had in our view, become property of the Assembly.

Accordingly, we see no basis, upon which the view that the four Bills had been taken over by the Council, can be supported because the Treaty has not bestowed any power on the Council to take over Bills without observance of the Assembly Rules and we hold that the only lawful way of withdrawing Bills which have become property of the Assembly, as the four Bills had become, is under rule 34 of the Assembly Rules which provides for a Motion to be introduced in the Assembly for that purpose. The Motion requirement is because the four Bills which were Private Members Bills; were introduced into the Assembly by means of Motions. In its relevant parts rule 34 says:

- 34(1) a motion or an amendment to the motion may be withdrawn at the request of the mover by leave of the House or Committee before the question is put.

We therefore find that the appearance before the Assembly of Mr Koech, a Member of Council on behalf of the Chairperson, without more, is ineffective as a means of withdrawing the Bills, in that a bare statement which was not a Motion to withdraw any of the Bills does not accord with the requirement of rule 34 aforesaid and so in our opinion, was the letter dated 16 September 2005 addressed by the Secretary General to the Speaker of the Assembly. We accept that once a Bill is in the Assembly, its permission must be sought to withdraw such a Bill. The permission requirement applies irrespective of whether the Bill in question had been a Private Member's Bill or a Community Bill.

Issue five is whether the decisions of the Council are binding on the Assembly under article 16 of the Treaty. The issue arose because of the respondent's contention that the decision of Council given pursuant to article 14 of the Treaty override the bar stipulated in article 16 thus: "other than the Summit, the Court and the Assembly within their areas of jurisdictions." The respondent further submitted that because of the all embracing power of the Council under article 14, the Assembly is bound by the Council decision to withdraw the Bills.

However, the applicants dispute that contention on the basis of article 49(1) of the Treaty which is on the Assembly's functions and also drew attention to article 14(3)(b) of the Treaty which has as one of the functions of the Council the initiation of legislation; but the article does not imply that the Council has the power to withdraw Bills at will unless in terms of the Assembly Rules.

Mr Ssempebwa examined article 16 of the Treaty which provides that decisions of the Council bind other organs and institutions of the Community "other than the Summit, the Court and the Assembly within their jurisdiction". He emphasized those words which he said are meant to underscore the separate and independent

jurisdictions of these organs of the Community. The matter at issue in this respect is withdrawal of Bills which have become the property of the Assembly and therefore within its jurisdiction.

We would like to draw attention to the provisions of paragraph (3)(c) of article 14 which provides:

“(3) For purposes of paragraph 1 of this article, the Council shall:

- (c) Subject to this Treaty, give directions to the Partner States and to all other organs and institutions of the Community other than the Summit, Court and Assembly.”

We are of the firm view that the combined effect of explicit provisions in article 14(3)(c) and article 16 is dispel any notion that the decisions of the Council albeit on policy issues bind the Assembly in respect of any matter within its jurisdiction.

We think the interpretation of article 16 of the Treaty is a core issue underlying this application and would refer to it in its entirety not only to deal with the opposing assertions of the parties but to bring to light certain inelegancies detected in the Table of Contents of that article, its heading in the body of the Treaty and finally its actual contents. Article 16 is as follows:

Subject to the provisions of this Treaty, the regulations, directives and decisions of the Council taken or given in pursuance of the provisions of this Treaty shall be binding on the Partner States, on all organs and institutions of the Community other than the Summit, the Court and the Assembly in their area of jurisdictions, and those to whom they may under the Treaty be addressed.

There is a variance between what the Table of Contents of the Treaty has for article 16 as “Effect of Regulations, Directives, Decisions and Recommendations of the Council” together with the heading of the article which also has the word “recommendations” included while the body of article 16 does not include that word “recommendations”.

This is obviously an inelegant drafting which should be corrected either to eliminate the word “recommendations” from the Table of contents and from the heading of the article or amend the article to include that word in the body of the article as well because it will one day lead to some uncertainty which should be avoided by a corrective amendment.

We see sense in the applicants’ submission that since the Assembly is a representative organ in the Community set up to enhance a people centred co-operation, its independence under article 16 of the Treaty should be preserved because the Treaty has not endowed the Council with any power to interfere in the operation of the Assembly.

We agree and it is our view that article 16 of the Treaty does not bear the meaning ascribed to it by the respondent in which it contended that decisions of Council bind the Assembly, article 16 of the Treaty notwithstanding. In light of articles 14 and 16, we have come to the conclusion that decisions of the Council have no place in areas of jurisdiction of the Summit, Court and the Assembly.

Issue four is whether or not under article 59 of the Treaty a member could move in the Assembly the Trade Negotiations Bill, the Immunities and Privileges Bill, and the Inter-University Council Bill. The respondent pleaded in paragraph 9 of the response as follows:

“At its nineteenth meeting held on 24 November 2004, the Council decided that policy oriented Bills such as those that have implications on the Partner States’ sovereign interests and on the budgetary aspects of the Community ought to be submitted to the Legislative Assembly by the Council under article 14(3)(b) of the Treaty as opposed to being proposed or introduced by any member of the Assembly under article 59 of the Treaty. The Council, therefore, assumed responsibility for “The East African Community Trade Negotiations Bill, The East African Community Budget Bill, The East African Community Immunities and Privileges Bill and The Inter-University Council for East Africa Bill as Council Bills for consideration and submission to the Legislative Assembly.”

In paragraph 10 of the response the respondent pleaded that protocols can sufficiently provide for immunities and privileges for the Community and also for the Inter-University Council for East Africa. Issues two and four arose from the above pleadings by the respondent. Article 59 States:

“There is no doubt that article 59 provides for introduction of Private Member’s Bills. It is also clear to us that both paragraphs one and two provide restrictions to the general power of legislation by the Assembly. The proviso to paragraph one prohibits the introduction of any motion in the Assembly which does not relate to the functions of the Community and does not relate to a matter with respect to which Acts of the Community may be enacted.”

Paragraph two, on the other hand, prohibits the Assembly from proceeding with any Bill which imposes a charge on any fund of the Community. It is abundantly clear to us that the prohibition under the two paragraphs apply to any member of the Assembly, both the members and also the Council when introducing Bills in the Assembly.

Therefore the question is not whether or not in view of article 59(1) the three Bills or any one of them could be moved by a member but whether they could be moved in the Assembly at all. To be able to determine that question would have required us to delve into the provisions of the Bills in great detail. Since we have elsewhere in this judgment found that the Bills are still pending before the Assembly and fortunately that is the view of all the parties to the reference, we deem it wise not to make such an

investigation as to whether the Bills are within the ambit of article 59(1) or not. The proper course to take, we think, is to leave it for whoever is aggrieved with any of the Bills, in the context of article 59, when they are taken on again in the Assembly, to raise the matter in the Assembly.

We will, however, make some general observations on the submissions of the parties regarding the provisions of article 59. In their submission on issue our the applicants submitted that under article 59 which provides for Private Member's Bills, there is no restriction on introduction of Bills based on policy orientation and that apart from Bills that impose a charge on the fund of the Community or issue or withdrawal from any fund of the Community or the remission of any debt due to the Community, a member of the Assembly may introduce any Bill.

With great respect we do not share that view. We have already stated that the proviso to article 59(1) prohibits the introduction of any motion in the Assembly which does not relate to the functions of the Community or does not relate to a matter with respect to which an Act of the Community can be enacted. We have also stated that the prohibition applies to both the Council and any member.

The respondent's contention in paragraph nine of the response was not confined simply to policy oriented Bills but it went on to describe them as "those that have implications on the Partner States sovereign interests." What it means is that the competence of the Community is restricted to matters which are within its jurisdiction. Any matter which is still under the exclusive sovereignty of the Partner States is beyond the legislative competency of the Community. The Assembly is a creature of the Treaty like the other Organs of the Community and such an Organ can only have competence on matters conferred upon it by the Treaty. The Assembly has no power to legislate on matters on which the Partner States have not surrendered sovereignty.

Issue seven is whether or not the decision taken by the Council at its tenth meeting held on 4 to 8 August 2005 on the East African Community Trade Negotiations Bill is lawful and in accordance with the provisions of the Treaty. We have already held that the Bill was not withdrawn from the Assembly. All that the Council did was to seek a stay of the debate while a study on the development of trade legislation is being undertaken and concluded. We therefore find that the decision of the Council in this respect is within its powers under article 14 of the Treaty and no fault may be ascribed thereto. We would like, while commending all counsel who appeared and addressed us in this case, especially to commend the very useful and helpful submissions addressed to us by Counsel for the amicus curiae who very ably and conscientiously assisted the Court without any attempt to side with any other party in the reference. The Court, as a friend of the amicus curiae, was guided accordingly.

On costs, Professor *Ssempebwa* urged the Court to what orders to make in the event his clients' Application succeeds. He indicated that the applicants are content with an order that their disbursements be paid by the respondent and would not insist on an

order for full costs in their favour. That is because the applicants see their application being for the general public good and interest in the East African Region and any litigation of this kind should be encouraged especially by the Community, which should show the way by indemnifying these applicants on their disbursement and any future litigants against costs occasioned by such litigation. The applicants, as we can see it, have succeeded in almost all their prayers. Though *Mr Kaahwa* had urged that costs should follow the event, we find Professor Ssempebwa's submission acceptable to us. We therefore award costs of the application to the applicants and leave them to restrict their bill of costs and for the taxing officer to limit the taxation thereof to those disbursements.

For the appellant:

Professor FE Ssempebwa, Mr DW Ogalo, Mr M Marando, Mr MS Kaggwa and Mrs SN Bagalaaliwo

For the respondent:

Mr W Kaahwa, Ms Makena Muchiri, Mr SN Tuimising, and Ms Isabelle Waffubwa

**ANYANG' NYONG'O AND OTHERS V
ATTORNEY-GENERAL OF THE REPUBLIC OF KENYA
AND OTHERS**

THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

CASE NUMBER 1 OF 2006

[1] East African Court of Justice – Jurisdiction to interpret and apply the treaty – To determine the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community.

[2] East African Court of Justice – Parties to proceedings – Who can be a respondent in a case at the East African Court of Justice.

[3] Injunction – Interim Injunction – At the East African Court of Justice – Applicable principles.

Editor's Summary

The applicants commenced a reference to the East African Court of Justice (hereinafter referred to as “the Court”) under article 30 of the Treaty for the Establishment of the East African Community (“the Treaty”). In the reference they contended *inter alia* that the process by which the representatives of the Republic of Kenya to the East African Legislative Assembly (EALA) were nominated was incurably and fatally flawed in substance, law and procedure and contravenes article 50 of the Treaty in so far as no election was held, and aver that the Clerk to the National Assembly of Kenya, second respondent, forwarded to the Clerk to the EALA, third respondent, an illegal list of names of Kenya's representatives. They prayed, *inter alia*, that the Court be pleased to restrain and prohibit the third and fourth respondents from assembling, convening, recognizing, administering oath of office or otherwise presiding over or participating in election of the Speaker or issuing any notification in recognition of Messrs Clerkson Otieno Karan, Safina Kwekwe Sungu, Gervase Akhaabi, Christopher Nakuleu, Sarah Godana, Abdi Rahman Haji, Reuben Oyondi, Catherine Ngima Kimura and Augustine Chemonges Lotodo as nominated representatives of the Republic of Kenya to the EALA.

The reference was filed on 9 November 2006 along with an *ex parte* application by Notice of Motion for interim orders *inter alia* that pending the hearing and determination of the motion and of the reference the Court be pleased to restrain and prohibit the third and fourth respondents from assembling, convening, recognizing, administering oath of office or otherwise howsoever

presiding over or participating in election of the Speaker or issuing any notification in recognition of any names of persons as duly nominated representatives of the Republic of Kenya to the EALA.

The Court ordered that the respondents be served so that the motion is heard *inter partes* on 24 November 2006. The first, second, fifth and sixth respondents raised as a preliminary objection, the Court's lack of jurisdiction to hear and determine the reference and to grant the restraining orders prayed for. In addition the second, fifth and sixth respondents objected to their being joined as parties to the suit. The Court directed at the commencement of the hearing that the three issues be argued together so that the decision on them may be given in one ruling.

Held - By virtue of article 27(1) of the East African Community Treaty, the East African Court of Justice has jurisdiction over the interpretation and application of the Treaty.

Under article 30, of the Treaty, the Court is empowered to exercise that jurisdiction by determining the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community referred to it on the ground that it is unlawful or it infringes provisions of the Treaty. In the reference the Court is called upon to determine if the process by which the Kenya's representatives to the EALA were nominated and the Election Rules under which it was undertaken are unlawful or an infringement of article 50 of the Treaty on Election of Members of the Assembly.

Since the applicants maintained that what transpired was not an election, and the Election Rules used did not conform to the procedure as envisaged under article 50 of the Treaty, on the face of it, therefore, in order to determine the reference, the Court has to decide what the expression "each Partner State shall elect" means and whether what transpired fits or does not fit within that meaning. This is an issue that falls within the jurisdiction of the Court.

A reference under article 30 of the Treaty should not be construed as an action in tort brought by a person injured by or through the misfeasance of another. It is an action to challenge the legality under the Treaty of an activity of a Partner State or of an institution of the Community.

The matters referred to the Court, whose legality it had to determine related to the responsibility of the Republic of Kenya as a Partner State, acting by its National Assembly under article 50 of the Treaty, to elect nine members of the East African Legislative Assembly.

The second, fifth and sixth respondents were wrongly joined to the reference.

It is trite law within the jurisdictions of the three Partner States in the East African Community, that an applicant who seeks an interim injunction must show a *prima facie* case with a probability of success. Secondly, a court will not normally grant an interim order unless it is shown that if the order is not made the applicant is likely to suffer irreparable damage or injury.

Injunction granted.

No cases referred to in ruling

Ruling

KEIWUA P, MULENGA VP, RAMADHANI, MULWA AND WARIOBA JJ: The applicants named above have brought a reference to this Court under article 30 of the Treaty for the Establishment of the East African Community (“the Treaty”). In the reference they contend *inter alia* that the process by which the representatives of the Republic of Kenya to the East African Legislative Assembly (EALA) were nominated was incurably and fatally flawed in substance, law and procedure and contravenes article 50 of the Treaty in so far as no election was held, and aver that the Clerk to the National Assembly of Kenya, second respondent, forwarded to the 15 Clerk to the EALA, third respondent, an illegal list of names of Kenya’s representatives.

They pray that this Court be pleased:

- (1) to interpret and apply the Treaty to the process of nomination and election of Kenya’s representatives to the EALA;
- (2) to declare that the Rules of Election applied by the Kenya National Assembly constitute a breach of article 50 of the Treaty and is (sic) therefore void;(3) to declare that the process of election, selection and/or nomination of members to the EALA by the Republic of Kenya is null and void;
- (3) to declare that the fifth and sixth respondents have no mandate to determine persons to represent the Republic of Kenya at the EALA;
- (4) to restrain and prohibit the third and fourth respondents from assembling, convening, recognizing, administering oath of office or otherwise presiding over or participating in election of the Speaker or issuing any notification in recognition of the following persons: Messrs Clerkson Otieno Karan, Safina Kwekwe Sungu, Gervase Akhaabi, Christopher Nakuleu, Sarah Godana, Abdi Rahman Haji, Reuben Oyondi, Catherine Ngima Kimura and Augustine Chemonges Lotodo as nominated representatives of the Republic of Kenya to the EALA;

- (5) to direct the Republic of Kenya through the first and second respondent [to] repeat its nomination and election process in compliance with article 50 of the Treaty within reasonable time as the Court may direct;
- (6) to extend time within which the Republic of Kenya will transmit names of duly elected members to the third and fourth respondents for purposes of being sworn in as members of the EALA;
- (7) to make such further or other orders as may be necessary in the circumstances.

The reference was filed on 9 November 2006 along with an *ex parte* application by Notice of Motion for interim orders *inter alia* that pending the hearing and determination of the motion and of the reference this Court be pleased – “to restrain and prohibit the third and fourth respondents from assembling, convening, recognizing, administering oath of office or otherwise howsoever presiding over or participating in election of the Speaker or issuing any notification in recognition of any names of persons as duly nominated representatives of the Republic of Kenya to the EALA”.

When the Notice of Motion came up for hearing *ex parte* on 17 November 2006, we considered that notwithstanding its urgency, its import warranted giving the respondents opportunity to be heard. Accordingly we ordered that the respondents be served so that the motion is heard *inter partes* on 24 November 2006. The respondents were duly served and on the fixed day, the first respondent appeared in person and the rest by counsel.

Prior to the hearing the first, second, fifth and sixth respondents gave notice that they would raise as a preliminary objection, this Court’s lack of jurisdiction to hear and determine the reference and to grant the restraining orders prayed for. In addition the second, fifth and sixth respondents objected to their being joined as parties to the suit. In view of the urgency of the application for the interim order, the primacy of the objection to the court’s jurisdiction and the need to determine early who are the rightful parties to a suit, and because of constraint of time, the Court directed at the commencement of the hearing 16 that the three issues be argued together so that the decision on them may be given in one ruling.

1. JURISDICTION

The contention that this Court lacks jurisdiction to determine the reference was premised on an argument, articulated variously by the respective counsel for the respondents, that in substance the reference was brought to challenge the election of Kenya’s nine representatives to the EALA. It was stressed that “the Treaty for the Establishment of the East Africa Community Election of Members of the Assembly) Rules 2001” (the Election Rules) under which the nine representatives were elected were the same under which the outgoing representatives were

elected, and that applicants had fully participated in the election process under the same rules without protesting their illegality. It was only after the applicants' candidates failed to be elected that the Referee was brought under the guise of seeking interpretation of the Treaty when the real purpose was to challenge the outcome of the election.

In his submissions, the learned Attorney General stressed that the initial jurisdiction vested in this Court under clause one of article 27 of the Treaty is very restricted, and that the Court should not assume jurisdiction that is not yet vested in it or jurisdiction that is vested elsewhere. He maintained that jurisdiction over the interpretation and application of the Treaty does not extend to determining questions arising from elections of members of the EALA. He pointed out that in article 52(1) the Treaty expressly reserves the jurisdiction to determine such questions to the appropriate institutions of the Partner States.

Mr Wekesa, learned counsel for the sixth respondent, sought to crystallize the argument. He submitted that under the Court's jurisdiction vested by article 27(1) of the Treaty, the Court was competent to consider and determine whether the Election Rules under which the National Assembly of Kenya proceeded in electing the nine representatives infringed article 50 of the Treaty, but it was not competent to determine if elections carried out under those rules were lawful because by virtue of article 52(1) that was the preserve of the pertinent national institution, namely the High Court of Kenya. Learned counsel invited the Court to decline to entertain the feigned reference for interpretation, which in his view was tantamount to abuse of court process.

It is common ground that by virtue of article 27(1) of the Treaty, this Court has jurisdiction over the interpretation and application of the Treaty. Under article 30, of the Treaty, the Court is empowered to exercise that jurisdiction by determining the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community referred to it on the ground that it is unlawful or it infringes provisions of the Treaty. Article 27(1) provides – “The Court shall initially have jurisdiction over the interpretation and application of this Treaty”.

And article 30 provides: “...”

It cannot be gainsaid that in the reference the Court is called upon to determine if the process by which the Kenya's representatives to the EALA were nominated and the Election Rules under which it was undertaken are unlawful or an infringement of article 50 of the Treaty on Election of Members of the Assembly. The article provides in clause one “...”

The applicants maintain that what transpired was not an election, and the Election Rules used did not conform to the procedure as envisaged under the said provision. On the face of it therefore, in order to determine the reference the Court has to decide what

the expression “each Partner State shall elect” means and whether what transpired fits or does not fit within that meaning. We are satisfied that this is an issue that falls within the jurisdiction of this Court.

2. WRONGLY JOINED PARTIES

The objections to being joined raised by the second, fifth and sixth respondents were virtually on the same ground, namely that by virtue of the provisions of article 30 of the Treaty they were wrongly enjoined to the reference and the motion. They maintained that under that article, only an Act, regulation, directive decision or action of a Partner State or an institution of the Community may be referred to this Court. Although they were joined in their respective official capacities, they did not come within the ambit of article 30 of the Treaty. The second respondent was sued as Clerk to the National Assembly of Kenya. The fifth respondent, who is the Vice President of Kenya, was sued as Leader of Government Business in the National Assembly. The sixth respondent was sued as Chairman of NARC-Kenya, a political party. The reason for joining the three respondents is disclosed in paragraph 33 of the reference where the applicants aver that the three “colluded and connived in the violation of law as they usurped the authority of the Party Leader of the Ruling Party NARC and collectively robbed Kenyans of the opportunity to decide by democratic means their representatives to the EALA”.

Mr Mutala Kilonzo, learned counsel for the applicants, strenuously argued that since the natural person has the capacity to sue in this Court the natural person must have the capacity to be sued in the same Court under the Treaty. He urged the Court to give to article 30 an interpretation that would bring natural persons who commit misfeasance that infringe on provisions of the Treaty within the ambit of article 30, to account for their actions.

With due respect to counsel for the applicants, it appears to us that enjoining the second, fifth and sixth respondents to the reference was under a misconception. A reference under article 30 of the Treaty should not be construed as an action in tort brought by a person injured by or through the misfeasance of another. It is an action to challenge the legality under the Treaty of an activity of a Partner State or of an institution of the 18 Community. The alleged collusion and connivance, if any, is not actionable under article 30 of the Treaty.

We think there is merit in the objections. The matters referred to this Court, whose legality it has to determine relate to the responsibility of the Republic of Kenya as a Partner State, acting by its National Assembly under article 50 of the Treaty, to elect nine members of the EALA. Both the process of selecting the nine members whose names have been remitted to the third respondent and the Election Rules under which they were elected or selected were done by the Republic of Kenya through its National Assembly. It is for that reason that the Attorney General of Kenya was rightly made the first respondent.

We are satisfied that the second, fifth and sixth respondents were wrongly joined to the reference and we order that they be struck off with costs.

3. INTERIM INJUNCTION

The clear purpose of the application for the grant of an interim injunction is to prevent the nine persons elected by the National Assembly of Kenya taking office as Members of the EALA until this Court determines whether or not the process of their election was unlawful or an infringement of the Treaty. The applicants contend that if the injunction is not granted there would be an irreparable damage because after taking office as Members of the EALA there is no legal means for removing them even if this Court subsequently determines under the reference that the process of electing them was not lawful.

It is not in dispute that in absence of any restraining order, the said nine persons will be sworn-in along with the Members elected by the National Assemblies of Tanzania and Uganda. The third and fourth respondents have confirmed in their respective affidavits that the commencement of the second EALA will be effected on 29 November 2006 and that all the elected Members will be facilitated to take the oath of office on that day. The contentious issue is what would happen if they assumed office and subsequently this Court determined in the reference that the process of their election and the Election Rules used therein were an infringement of article 50 of the Treaty. The learned *Attorney General* and both *Mr Macharia* and *Mr Nyaoga* the learned counsel for the second and fifth respondents respectively, contended that the applicants armed with a declaration of this Court that the process and the rules were unlawful or an infringement of the Treaty would be able by virtue of the provisions of article 52 to move the High Court of Kenya to annul the elections. However, the learned counsel for the 6th respondent appeared to canvass a different view more akin to that of counsel for the applicants. He submitted that such a declaration would have no consequence on the election that has already been carried out under the Election Rules that were competently and lawfully made under article 50 of the Treaty by the National Assembly of Kenya. He opined that the declaration would be applied to the making of future procedure for the election of Members of the EALA.

We are constrained to state at the outset that the enormity of this application cannot be over emphasised. The subject matter of the restraining order prayed for is the EALA, a very important organ of the Community. The implications of declining to grant the order and of granting it are grave. In an affidavit in support of the application, Fidellis Mueke Ngulli deponed that if the order is not granted not only the applicants will suffer irreparably but also “the legitimacy of [the]

EALA [will be] greatly imperiled by the unelected and irregularly wounded (sic) members from Kenya”. On the other hand, in their respective affidavits opposing the application, both the third and fourth respondents deponed that “the EALA in particular, and the East African Community in general stands to suffer great hardship if an injunction against the swearing in of the Members of the EALA is issued”.

It is trite law within the jurisdictions of the three Partner States in the East African Community, that an applicant who seeks an interim injunction must show a *prima* case with a probability of success. Secondly, a court will not normally grant an interim order unless it is shown that if the order is not made the applicant is likely to suffer irreparable damage or injury.

We have read the pleadings and documentary annexures so far filed in Court in the reference and in the motion. We also benefited tremendously from the very able submissions by all learned counsel who addressed us. We are satisfied that the applicants have shown that they have a *prima facie* case with a probability of success. This of course is subject to what pleadings the respondents will bring in response to the reference. For obvious reasons, at this stage we would wish to refrain from discussing the merits of the case in any detail. The finding that there is a *prima facie* case with a probability of success is to say no more than that if the respondents do not put up any probable defence or response the applicants would succeed.

We also think that the second criterion for the grant of an interim injunction is satisfied. It is apparent that in the present state of the law, the hearing and determination of the reference after the affected persons have taken office might not assist to prevent the alleged illegality being perpetuated. We are satisfied that not only the applicants but also the EALA and the Community itself stand to suffer irreparable damage if it turns out that one third of the Members of the EALA were not legally elected. The fact that the out going Kenyan Members were elected in a similar manner in 2001, should not be a source of solace but rather should be a reason to determine soon if the process is illegal and ought to be rectified.

Accordingly, we hereby grant an interim injunction restraining the third and fourth respondents from recognizing the following persons as duly elected Members of the EALA or permitting them to participate in any function of the EALA until the final determination of the reference, namely:

“In this ruling we have given our full decisions on the three issues raised in this application. We shall, however, give our detailed reasons for the same later. The costs of the application shall be in the cause.”

For the appellant:
Mr Mutula Kilonzo

For the first respondent:
Appeared in person

For the second and fifth respondents:
Attorney General and both Mr Macharia and Mr Nyaoga

For the sixth respondent:
Mr Wekesa

NANGALE AND OTHERS V ATTORNEY GENERAL OF THE REPUBLIC OF KENYA AND OTHERS

THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

APPLICATION NUMBER 2 OF 2006
ARISING FROM REFERENCE NUMBER 1 OF 2006

[1] *Orders of the East African Court of Justice – Components of an order of court – Power of court to direct amendment of its orders.*

Editor's Summary

The Court delivered a ruling on 27 November 2006, in an interlocutory application made under reference number 1 of 2006 by the claimants, granting, *inter alia*, an interim injunction. Pursuant to rule 67 of the East African Court of Justice Rules of Procedure (the Court Rules), the Registrar extracted and signed an order from the ruling embodying the interim injunction.

By a Notice of Motion dated 30 November 2006, George Nangale, the applicant, applied as an interested person under rule 68(2) of the Court Rules, for an order that the said extracted order be corrected to correspond with the decision of the Court, which it purports to embody on the grounds that the extracted order is wider than the ruling of the Court; the said order had paralysed all activities of the East African Legislative Assembly (EALA) contrary to the ruling of the Court; and, it was in the interest of justice to allow the application.

Held – Rule 67 of the East African Court of Justice Rules requires every decision of this Court to be embodied in an order and directs that such order be dated as of the date the decision was delivered; contain particulars of the case; and specify clearly the relief granted or other determination of the case.

The Court has power to correct errors in its judgments and orders.

While ordinarily the Court ought to correct an order that does not correspond with the judgment it purports to embody, the Court retains the discretion to refuse to correct its order in appropriate circumstances. *Moore v Buchanan and another* [1967] 3 All ER 273 followed.

The extracted order did not correspond to the ruling it purported to embody.

Application allowed.

Case referred to in ruling

(“A” means adopted; “AL” means allowed; “AP” means applied; “APP” means approved; “C” means considered; “D” means distinguished; “DA” means disapproved; “DT” means doubted; “E” means explained; “F” means followed; “O” means overruled)

Moore v Buchanan and another [1967] 3 All ER 273 – F

Ruling

KEIWUA P; MULENGA VP; AUGUSTINO, MULWA AND NSEKELA JJ: On 27 November 2006, this Court delivered a ruling in an interlocutory application made under the above mentioned Reference by the above named claimants, granting, *inter alia*, an interim injunction. Pursuant to rule 67 of the East African Court of Justice Rules of Procedure (the Court Rules), the Registrar extracted and signed an order from the ruling embodying the interim injunction.

By a Notice of Motion dated 30 November 2006, George Nangale, the above mentioned applicant, applied as an interested person under rule 68(2) of the Court Rules, for an order that the said extracted order be corrected to correspond with the decision of the Court, which it purports to embody. The grounds of the application are that:

- (1) The extracted order is wider than the ruling of the Court;
- (2) The said order has paralysed all activities of the East African Legislative Assembly (EALA) contrary to the ruling of the Court;
- (3) It is in the interest of justice to allow the application. The application is supported by an affidavit of the applicant, who deponed, *inter alia*, that:
 - (a) He is a member of the EALA representing Tanzania;
 - (b) In a letter dated 27 November 2006, to all Members the Clerk to the EALA suspended the activities of the EALA on the basis of the Court order aforesaid;
 - (c) At a meeting addressed by the Deputy Secretaries General, the Members were informed that there was no Assembly and that there were no members of the EALA;
 - (d) He read the judgment (sic) of the Court and found that the said order is at variance with it.

The claimants as well as the third and fourth respondents opposed the application on the grounds that the extracted order embodies and is not wider than the ruling.

Through a Replying Affidavit sworn by Patrick Gichuru Gichohi, Deputy Clerk of the Kenya National Assembly, the first respondent, while conceding that the extracted order was wrongly drawn in some respects, contended that the application lacked merit in that the inability of the EALA to function arises from the ruling and not from any error in extracting the order.

At the hearing of the application, *Mr Ogalo Wandera*, learned counsel for the applicant highlighted the contents of the extracted order that were not part of the ruling and whose inclusion gave the extracted order an erroneously wider scope than that expressed in the ruling of the Court. He maintained that because of the inclusion of those extraneous matters the order has been applied to aspects, such as the EALA members' privileges, which were not in the Court's contemplation in its ruling. He submitted that the court ought to correct any error in its order even if it be minor, and he stressed that in the instant case the variance between the ruling and the extracted order warranted correction by expunging the extraneous contents.

Mr Mutula Kilonzo SC, learned counsel for the claimants, submitted that the ruling and the extracted order should not be read in isolation of the prayers in respect of which the ruling was made and the interim injunction was granted. The expressions in the order objected to by the applicants, were the expressions employed in the prayer for the injunction. He maintained that the extracted order was on all fours with the ruling. *Mr Wanjuki Muchemi*, the learned Solicitor General of Kenya, who appeared for the first respondent, associated himself with the submissions of *Mr Mutula Kilonzo* and stressed that there was no disparity between the ruling and the extracted order. *Mr Kaahwa*, the learned Counsel to the Community, who represented the third and fourth respondents, framed two questions which the court has to consider in an application for correction of an extracted order, namely:

- (1) whether the extracted order embodies the Court's decision in accordance with rule 67 of the Court Rules; and
- (2) whether the order contains grave mistakes. He answered the first in the affirmative and the second in the negative and submitted that there was no cause for correction of the order. He relied on *Moore v Buchanan and another* [1967] 3 All ER 273, for the proposition that only a grave mistake in an order warrants correction.

Rule 67 of the Court Rules requires every decision of this Court to be embodied in an order and directs that such order shall:

- (a) be dated as of the date the decision was delivered;
- (b) contain particulars of the case; and
- (c) specify clearly the relief granted or other determination of the case.

The decision in issue in this application is the ruling this Court delivered on 27 November 2006. The ruling relates to the claimants' application under the Reference, for an interim injunction and to the respondents' preliminary objections. The correction sought in this application, however, relates only to the relief of an interim injunction, which the Court granted not in the terms of the application but in the following terms:

"Accordingly, we hereby grant an interim injunction restraining the third and fourth respondents from recognizing the following persons as duly elected Members of the EALA or permitting them to participate in any function of the EALA until the final determination of the reference."

That was followed by the list of names of the nine persons submitted to the fourth respondent as the Members of the EALA elected by the Kenya National Assembly.

The part of the order extracted and signed by the Registrar relevant to this application reads as follows:

"It is hereby ordered:

- (2) That pending the hearing and final determination of the reference herein, the third and fourth respondents are hereby restrained and prohibited from assembling, convening, recognizing, administering oath of office or otherwise howsoever presiding over or participating in election of the Speaker or issuing any notification in recognition of the following persons: Messrs (names of the 9 persons) as nominated representatives of the Republic of Kenya to the EALA."

Much as we may agree with learned counsel for the claimants and the respondents that in substance both the order as pronounced in the ruling and as extracted amount to an interim injunction with restraints and prohibitions directed to the 3rd and fourth respondents in respect of the nine named persons, the restraints and prohibitions are at such variance that it cannot be appropriately said that the latter was extracted from the former in compliance with rule 67 of the Court Rules. We note the explanation volunteered by learned counsel for the claimants that some of the wording in the extracted order originate from the prayers in the claimants' motion. In our view that *per se* contradicts rule 67 which requires the order to embody the decision of the Court not the pleadings or prayers of the parties. What is more, we are constrained to observe, without discussing in detail, that far from clarifying the relief granted, as required under rule 67, the added wording has the tendency of confusing it.

The Court's power to correct errors in its judgments and orders is provided for under rule 68 of the Court Rules. Sub-rule (1), provides for correction of judgments. Sub-rule (2), under which this application is brought, provides:

“An order of the Court may at any time be corrected by the Court either of its own motion or on application by any interested person if it does not correspond with the judgment it purports to embody or, where the judgment has been corrected under sub-rule (1), with the judgment as corrected.”

Clearly, this is a discretionary power. While ordinarily the Court ought to correct an order that does not correspond with the judgment it purports to embody, the Court retains the discretion to refuse to correct its order in appropriate circumstances. In *Moore v Buchanan* (*supra*) the English Court of Appeal, applying the equivalent rules under the RSC, held that there was discretion to refuse to correct an error in an order:

“wherever something had intervened subsequently which rendered it inexpedient or inequitable to make the correction.” We are of a similar view in respect of rule 68(2) of the Court Rules, and would exercise the discretion on the same criteria.”

In the instant case, we are satisfied that the extracted order does not correspond to the ruling it purports to embody. The parties opposing the application have not shown that it would be inexpedient or inequitable to correct the extracted order so as to make it correspond to the ruling. Indeed learned counsel for the claimants conceded that no harm would arise from the proposed correction.

For these reasons we allow the application and direct that the extracted order be corrected to correspond and be in the terms of the reliefs granted in the ruling of this Court dated 27 November 2006. We make no orders as to costs.

For the appellant:
Mr Ogalo Wandera

For the respondent:
Mr Mutula Kilonzo

For the first respondent:
Mr Wanjuki Muchemi

For the third and fourth respondents:
Mr Kaahwa

ATTORNEY-GENERAL OF THE REPUBLIC OF KENYA V ANYANG' NYONG'O AND OTHERS

THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

APPLICATION NUMBER 5 OF 2006
ARISING FROM REFERENCE NUMBER 1 OF 2006

[1] Bias – Disqualification of judicial officer – Applicable principle – Procedure for making the application.

Editor's Summary

The Attorney General of Kenya, who was the 1st respondent in East African Court of Justice Reference number 1 of 2006, brought an application by Notice of Motion dated 19 January 2007 and filed on 22 January 2007. The application was stated to be made under articles 23, 26, 27 and 35 of the East African Community Treaty and rules 17 and 70 of the East African Court of Justice Rules of Procedure (the Court Rules), praying for Orders that the application be certified urgent; the Honourable Justice Moijo Ole Keiwua, President of the Court and Honourable Justice Kasanga Mulwa, Judge of the Court, disqualify themselves from further hearing of the reference and applications therein; the Court sets aside its ruling delivered on 27 November 2006; and the costs of the application be provided for.

The application was based on the grounds that Justice Moijo Ole Keiwua and Kasanga Mulwa failed to disclose to the parties a material fact, namely, the fact that they were related to the Republic of Kenya in a manner which rendered it impossible for them to give a fair hearing to the 1st respondent since on 15 October 2003 Justice Moijo Ole Keiwua was suspended from the performance of his functions of a Judge of Appeal in the republic of Kenya and a tribunal to investigate his conduct as such was appointed; and, on 15 October 2003 Justice Kasanga Mulwa was suspended from the performance of his functions of a puisne judge in the republic of Kenya and a tribunal to investigate his conduct as such was appointed.

Held – As members of the Court, the judges, individually and collectively, must be in the forefront in ensuring the maintenance of public confidence in the Court. They however must not lightly accede to veiled intimidation in form of unsubstantiated allegation that they or any of them has undermined public confidence in the Court. The Court has jurisdiction to hear and determine an application to set aside its order on the ground that it was made in breach of the fundamental principle of judicial impartiality Only through strict adherence to the

principle of judicial impartiality can protection of the universally accepted right of every litigant to a fair trial, be enforced.

Apart from inherent jurisdiction at common law, in appropriate circumstances, this Court can invoke its jurisdiction under article 35 of the Treaty to review its order as unjust if the order was made in violation of the principle of judicial impartiality.

In an application for a judge to recuse himself from sitting on a Coram, as from sitting as a single judge, the procedure practiced in the East African Partner States, and which this Court would encourage litigants before it to follow, is that counsel for the applicant seeks a meeting in chambers with the judge or judges in the presence of [the] opponent. The grounds for recusal are put to the judge who would be given an opportunity, if sought, to respond to them. In the event of recusal being refused by the judge the applicant would, if so advised, move the application in open court.” *The President of the Republic and others v South African Rugby Football Union and others* (case CCT 16/98) (the SA Rugby Football Union case) followed.

The rationale for and benefit from that procedure is obvious, namely, apart from any thing else, in practical terms it helps the litigant to avoid rushing to court at the risk of maligning the integrity of the judge or judges and of the court as a whole, without having the full facts. Where a recusal application comes before a court constituted by several judges, it appears to us that, subject to the judge whose recusal is sought giving his individual decision on the matter, all the judges constituting the Coram for the case have collective duty to determine if there is sufficient ground for the judge to recuse himself from further participation in the case.

Judicial impartiality is the bedrock of every civilized and democratic judicial system. The system requires a judge to adjudicate disputes before him impartially, without bias in favour of or against any party to the dispute. There are two modes in which the courts guard and enforce impartiality. First, a judge, either on his own motion or on application by a party, will recuse himself from hearing a cause before him, if there are circumstances that are likely to undermine, or that appear to be likely to undermine his impartiality in determining the cause. Secondly, through appellate or review jurisdiction, a court will nullify a judicial decision if it is established that the decision was arrived at without strict adherence to the established principles that ensure judicial impartiality. The first is that “a man ought not to be a judge in his own cause”. The second, which additionally is intended to preserve public confidence in the judicial process, is that “justice must not only be done but must be seen to be done”.

Automatic disqualification applies not only where the judge is directly or indirectly a party or has financial or proprietary interest in the suit, but also where

he has some other interest in the outcome of the suit. In a case where an automatically disqualified judge does not recuse himself, the decision or order he makes or participates in, will be set aside, notwithstanding that he did not act with bias.

Where the judge is not a party and does not have a relevant interest in the subject matter or outcome of the suit, a judge is only disqualified if there is likelihood or apprehension of bias arising from such circumstances as relationship with one party or preconceived views on the subject matter in dispute. The disqualification is not presumed like in the case of automatic disqualification. The applicant must establish that bias is not a mere figment of his imagination.

The objective test of “reasonable apprehension of bias” is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the view of a reasonable, fair-minded and informed member of the public that the judge did not (will not) apply his mind to the case impartially. Needless to say, a litigant who seeks disqualification of a judge comes to court because of his own perception that there is appearance of bias on the part of the judge. The court, however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair-minded and informed about all the circumstances of the case would be.

A judicial officer is required to disclose facts that may raise apprehension of possible bias on his part, in order to show that he has no actual bias and to give opportunity to a party who considers that he might be prejudiced, to exercise the right to apply for the judge to recuse himself or to waive that right. The disclosure is not a precondition for the application to be made. A litigant who has knowledge of such facts is at liberty to make the application even in absence of their disclosure by the judge. It follows that an applicant who relies on the judge’s failure to disclose material facts must show that those facts were not within his or his legal advisor’s knowledge.

Failure of a judge to disclose facts that are within public knowledge cannot be a ground on which a reasonable member of public would apprehend bias. The suspension of Justice Moijo Ole Keiwua and the appointment of a tribunal to investigate his conduct, have been matters of public knowledge since they were published in the Kenya Gazette of 15 October 2003, not to mention publications in mass media.

Besides, both the appointment of the tribunal and the suspension of the judge were acts done by the Government of Kenya to which the applicant is the principal legal advisor. It is reasonable to assume that he was consulted on those matters. In any case it was not suggested that the facts were not in his knowledge.

A party to any judicial proceedings has a right to object to any judge or judicial officer sitting if he or she has good reason for raising such objection. However,

whoever intends to raise such objection is obliged to raise his objection at the earliest opportunity. *Ole Keiwwa v Chief Justice of Kenya and others* [2006] KLR followed.

A reasonable person would not perceive that a judge, whose conduct is under investigation, would risk conducting an unfair adjudication against the very authority investigating his conduct. A reasonable and informed person, knowing that the judge sits in a panel of five judges, trained and sworn to administer justice impartially, would not in perceive that the judge would skim to single handedly deny the applicant a fair hearing or justice. A reasonable, informed and fair-minded member of the public, appreciating the subject matter and nature of the reference, would credit the judge with sufficient intelligence not to indulge in futile animosity.

While litigants have the right to apply for the recusal of judicial officers where there is a reasonable apprehension that they will not decide a case impartially, this does not give them the right to object to their cases being heard by particular judicial officers merely because they believe that such persons will be less likely to decide the case in their favour. The nature of the judicial function involves the performance of difficult and at times unpleasant tasks. Judicial officers are nonetheless required to 'administer justice to all persons alike without fear, favour or prejudice in accordance with the Constitution and the law. To this end they must resist all manner of pressure, regardless of where it comes from. This is the constitutional duty common to all judicial officers. If they deviate, the independence of the judiciary would be undermined and in turn the Constitution itself.

Application dismissed with costs.

Cases referred to in ruling

("A" means adopted; "AL" means allowed; "AP" means applied; "APP" means approved; "C" means considered; "D" means distinguished; "DA" means disapproved; "DT" means doubted; "E" means explained; "F" means followed; "O" means overruled)

East Africa

King Woollen Mills Limited and another v Standard Chartered Financial and another civil application number 102 of 1994

Ole Keiwwa v Chief Justice of Kenya and others [2006] KLR – F

United Kingdom

Locabail (UK) Limited v Bayfield Properties Limited and another [2000] QB 451

R v Bow Street Metropolitan Stipendiary Magistrate and others ex parte Pinochet Ugarte number 2 [1999] 1 All ER 577

South Africa

The President of the Republic and others v South African Rugby Football Union and others
(case CCT 16/98) – F

Ruling

MULENGA VP, RAMADHANI, MULWA AND NSEKELA JJ: This is an interlocutory application emanating from a reference pending in this Court, in which the respondents herein pray *inter alia* for orders by way of declarations that the process of “electing” the nine members of the East African Legislative Assembly (the EALA) to represent the Republic of Kenya and the rules under which the process was undertaken, violated the provisions of article 50 of the Treaty for the Establishment of the East African Community (the Treaty). The Attorney General of Kenya, who is the first respondent in the reference, brings this application by Notice of Motion dated 19 January 2007 and filed on 22 January 2007. The application is stated to be made under articles 23, 26, 27 and 35 of the Treaty and rules 17 and 70 of the East African Court of Justice Rules of Procedure (the Court Rules), praying for Orders:

- (1) That the application be certified urgent;
- (2) That Honourable Justice Moiwo Ole Keiwua, President of this Court and Honourable Justice Kasanga Mulwa, Judge of this Court, disqualify themselves from further hearing of the reference and applications therein;
- (3) That the Court sets aside its ruling delivered on 27 November 2006; and
- (4) That the costs of the application be provided for. Although, as we shall indicate later in this ruling, the applicant belatedly and informally made substantial alterations to the application in the course of submissions by counsel, it is necessary to first set out the prayers and the grounds of the application as pleaded for proper appreciation of the full context. The motion lists 19 statements expressed to be the grounds on which the applications therein are made. We hereunder reproduce them in slightly abridged form, namely that:
 - (a) a judge who is involved, whether personally or jointly with any party to a suit, in promoting a joint cause through that suit, is automatically disqualified from hearing that suit;
 - (b) judges of the EACJ are mandated to be impartial – (Article 24);
 - (c) a ruling or judgment by an automatically disqualified judge who failed to disqualify himself at or before the hearing is null and void and will be set aside by the court on application by the aggrieved person;
 - (d) an aggrieved party is entitled to apply for an order that an automatically disqualified judge who fails to disqualify himself does disqualify himself;

- (e) failure of Justice Moiyo Ole Keiwua and Justice Kasanga Mulwa to disclose their interests and disqualify themselves has adversely affected the integrity of the Court and undermined the confidence of East Africans in the Court;
- (f) the Partner States are aggrieved by the immense consequences of the ruling delivered on 27 November 2006 and in view thereof agreed to urgently convene a Special Summit;
- (g) on 15 October 2003 Justice Moiyo Ole Keiwua was suspended from the performance of his functions of a Judge of Appeal and a tribunal to investigate his conduct as such was appointed;
- (h) the tribunal was to investigate allegations that Justice Moiyo Ole Keiwua was 28 involved in corruption, unethical practice, and absence of integrity in the performance of his office;
- (i) Justice Moiyo Ole Keiwua and Kasanga Mulwa failed to disclose to the parties a material fact, namely, the fact that they were related to the Republic of Kenya in a manner which rendered it impossible for them to give a fair hearing to the 1st respondent herein
- (j) on 15 October 2003 Justice Kasanga Mulwa was suspended from the performance of his functions of a Judge of Appeal (sic) and a tribunal to investigate his conduct as such was appointed;
- (k) the tribunal was to investigate the allegations that Kasanga Mulwa was involved in corruption, unethical practice, and absence of integrity in the performance of his office;
- (l) the conduct of Justice Moiyo Ole Keiwua and Justice Kasanga Mulwa, by failing to disclose those facts to the parties, has undermined and eroded the confidence of the people of East Africa in this Court;
- (m) through the Summit and other organs of the Community the people of East Africa have set in motion necessary measures to restore public confidence in this Court;
- (n) by virtue of the rule in *R v Bow Street Metropolitan Stipendiary Magistrate and others ex parte Pinochet Ugarte* number 2 [1999] 1 All ER 577, (the Pinochet case) the two judges were on 24 November 2006 and still are automatically disqualified from hearing this reference;
- (o) by virtue of the Treaty and the common law, the two judges were under a duty to disclose their interests on 24 November 2006 but failed to do so;
- (p) justice was neither done nor seen by people of East Africa to have been done on 24 November 2006;
- (q) if Justice Moiyo Ole Keiwua and Justice Kasanga Mulwa hear the reference and other applications herein, justice even if done, will not be seen to be done by the people of East Africa;

- (r) this Court has jurisdiction to set aside the ruling delivered on 27 November 2006;
- (s) the ruling was given pursuant to proceedings that violated both the rules of natural justice and provisions of the Treaty.

Needles to say, that while some of the statements constitute the grounds on which the motion is based, others are a mixture of the propositions of law, assertions of fact and arguments in support of the grounds. It is also important to note at the outset, that the motion contains two distinct, though related, applications. The first is that the named judges of the Court disqualify themselves from further hearing of the reference and applications therein. The other is that the Court sets aside its ruling delivered on 27 November 2006.

For clarity, it is useful to separate the grounds for each application although there is bound to be some overlapping. The grounds for the application that the two judges disqualify themselves from further hearing of the reference and related applications may be discerned from the statements listed as *g*, *h*, *i*, *j*, *k*, *n* and *q*. In summary they are that as a result of being suspended from performance of their functions as a Judge of Appeal and a Puisne Judge in the Republic of Kenya, respectively:

- (a) the two judges are related to the Republic of Kenya in a manner that renders it impossible for them to give a fair hearing to the Attorney General of Kenya as the 1st respondent in the reference;
- (b) the two judges are automatically disqualified from hearing the reference by virtue of the rule in *Pinochet's case* (*supra*);
- (c) justice will not be seen to be done if the two judges hear the reference.

The grounds for the application that the Court's ruling delivered on 27 November 2006, be set aside are discernable from the statements listed as *c*, *f*, *i*, *l*, *n*, *o*, *p* and *s*. Although in the course of arguing the application counsel for the Attorney General appears to have made some variations in the grounds, he did not amend the motion and so it is necessary to refer to them as pleaded. We would summarise them as follows:

- (a) the Partner States are aggrieved by the immense consequences of the ruling;
- (b) Justice Moijo Ole Keiwua and Justice Kasanga Mulwa were automatically disqualified from hearing the reference and applications therein and failure to disqualify themselves rendered the ruling null and void;
- (c) failure of the two judges to disclose to the parties their interests/material fact that they were suspended from judicial functions in the Republic of Kenya, and to disqualify themselves from participating in the proceedings on 24 November 2006

was in breach of their duty under the Treaty and the common law, to be and appear to be impartial;

- (d) the conduct of the two judges in failing to disclose their said suspension undermined and eroded the confidence of the people of East Africa in the Court;
- (e) the proceedings that resulted in the ruling of the Court in issue violated both the rules of natural justice and provisions of the Treaty. Background to this application.

The Treaty establishes the EALA as one of its organs and provides in article 50 that the National Assembly of each Partner State shall elect nine members of that organ.

Pursuant to Proclamations dated 16 November 2006, the Summit of the East African Community dissolved the first EALA with effect from 29 November 2006, and proclaimed that the second EALA was to commence on the same date.

By a letter dated 30 October 2006, the Clerk to the National Assembly of the Republic of Kenya informed the Secretary to the East African Community, that on 26 October 2006 the National Assembly of Kenya had elected nine members of the EALA whose names he listed in the letter.

On 9 November 2006, the respondents in this application filed the reference making the prayers we indicated above. At the same time they filed an *ex parte* application for an interim injunction for the purpose of stopping the nine representatives from Kenya taking office as members of the EALA, until determination of the reference.

When the *exparte* application came up for hearing on 17 November 2006, the Court directed that it ought to be heard *inter partes* and fixed 24 November 2006 for the hearing.

The application was heard by a full bench (Ole Keiwua P, Mulenga VP, Ramadhani, Mulwa and Warioba J) on 24 and 25 November 2006. *Mr Mutula Kilonzo* SC led a team of counsel for the claimants. The Attorney General of Kenya, Mr Amos Wako, appeared in person assisted by the Solicitor General, the Principal Litigation Counsel and a Senior State Counsel. The other respondents to the reference were also represented by counsel. The unanimous ruling of the Court, granting the interim injunction, was delivered on 27 November 2006.

After delivering the ruling, the Court invited the parties, in view of the serious implications the interim injunction was to have on the functioning of the EALA, to consider expediting the conclusion of outstanding pleadings, in order that the reference may be heard and disposed of at the earliest time possible. In response, all counsel agreed to abridge the time allowed by the rules for filing their respective pleadings. At a meeting between the President and Registrar of the Court with the counsel of all parties in the President's chambers, the Attorney General undertook

to file the response to the reference not later than 30 December 2006, and Counsel to the Community representing the third and fourth respondents, (the only other two respondents remaining in the reference after the Court struck out the rest in the ruling), undertook to file his amended response to the reference not later than 18 December 2006. Counsel for the claimants undertook to file the reply, if any, not later than 8 January 2007. The respondents' rejoinder, if any, was to be filed by 15 January 2007. Accordingly, pursuant to provisions of rule 52 of the Court Rules, the scheduling conference was fixed for 22 January 2007.

However, on 22 January 2007, just before the Court was due to start the scheduling conference, the most unexpected happened. Kenya's Solicitor General, Mr Wanjuki Muchemi, in the company of his Deputy, Ms Muthoni Kimani and Dr Gibson Kamau Kuria SC called on the President of the Court in his chambers to inform him that unless he and Justice Kasanga Mulwa disqualified themselves from further hearing of the reference, he had instructions to file this application. He handed to him copy of the Notice of Motion duly signed and dated 19 January 2007 with the Supporting Affidavit sworn by Ambassadors Dr Hukka Wario, on the same date.

The President consulted the other members of the Court present. Needless to say, the judges were all extremely surprised by the move, considering that no indication whatsoever had been given prior to that day that the Attorney General of Kenya had any apprehension about the two judges being on the Coram for hearing the reference, a fact he knew before the 24 November 2006; and notwithstanding that the facts on which he based the application for recusal were within his knowledge years before the reference was filed in this Court. The move was incredibly inconsistent with the assurances the Attorney General Mr Amos Wako made in open court personally on 24 November 2006 when he said:

"My Lords, if you should come to the unlikely conclusion that you have jurisdiction ...even if we shall be thoroughly dissatisfied with the decision, we shall have no alternative but to comply in terms of article 38."

We shall revert to this later in this ruling. Be that as it may, thereafter the judges went to court to appraise other parties of the new development and to adjourn the scheduling conference until disposal of the new application, which was then fixed for hearing on 30 January 2007, allowing time for service of the application on the other parties and for them to respond if they so wished.

1. THE ISSUES FOR DETERMINATION

It is with this background that this application came up for hearing. In his opening address, the learned Solicitor General Mr Wanjuki Muchemi outlined the issues arising from the pleadings to be addressed and determined by the Court. However, in the course of his submissions, Dr Kamau Kuria SC who addressed us on the rest

of the case for the Attorney General, abandoned such substantial assertions on which the applicant's case was founded, that it is necessary at this juncture, to appreciate what remained of the case.

First, in the course of his main submissions the learned Senior Counsel abandoned the express pleading to the effect that by virtue of the rule in Pinochet's case (*supra*) the two judges were "automatically disqualified" from hearing the reference, and that failure to disclose their interests and to recuse themselves from the proceedings, violated the rules of natural justice and provisions of the Treaty, thus rendering the resultant ruling null and void. He also submitted that he was not relying on actual bias on the part of the judges. He maintained instead, that the application should be considered on the premise of a perception that the judges may be biased as a result of their relationship of "animosity" towards the Government of Kenya.

Secondly, in the course of his submissions in reply on the second day, the Court asked the learned Senior Counsel to elaborate on and substantiate his repeated submission that the people of East Africa had lost confidence in this Court as a result of the failure of the two judges to recuse themselves; or if necessary to avail for examination Dr Wario, in whose affidavit that contention was made. Counsel asked and was given ten minutes to consult with his legal team. After the consultation he withdrew his submissions on the contention that the East Africans had lost confidence in this Court. For what it is worth, he withdrew all the averments and arguments related to it and specifically withdrew the contents of paragraphs 16 and 17 of Dr Wario's affidavit which directly alluded to the contention.

However, the learned Senior Counsel, quite rightly in our view, observed that statements concerning the events that followed the Court's ruling delivered on 27 November 2006, namely the hurried process of amendments to the Treaty in reaction to the ruling, could not be withdrawn as they were indisputable facts of history that cannot be undone. That of course is obvious. What we found unacceptable was for the applicant to allege without substantiation, that the hurried process was necessitated by the loss of public confidence in the Court. As members of the Court, the judges, individually and collectively, must be in the forefront in ensuring the maintenance of public confidence in the Court. They however must not lightly accede to veiled intimidation in form of unsubstantiated allegation that they or any of them has undermined public confidence in the Court.

Thirdly, towards the conclusion of his submissions the learned Senior Counsel conceded that it was an error to include Justice Kasanga Mulwa in the application. This was in consequence of the Court drawing his attention to two documents. The first document is copy of the Kenya Gazette dated 22 March 2004, in which under Gazette Notices numbers 2128 and 2129, His Excellency Mwai Kibaki,

President and Commander-in-Chief of the Armed Forces of the Republic of Kenya amended Gazette Notices numbers 8829 of 2003 and 378 of 2004 by deleting the name of Justice Kasanga Mulwa from the list of Puisne Judges whose conduct was to be investigated by a Tribunal. The second is a letter from Office of the President dated 26 March 2004 and addressed to Justice Kasanga Mulwa through the Honourable Chief Justice Evans Gicheru. In the letter, Ambassador Francis K Muthaura, MBS, Permanent Secretary/Secretary to the Cabinet and Head of the Public Service wrote that His Excellency the President had considered and accepted the request of Justice Kasanga Mulwa to retire early from the Judicial Service with benefits in accordance with his terms of service. He further wrote:

“Meanwhile, I wish to thank you on behalf of the Government for the services you rendered to the Judicial Services and wish you a prosperous time with the East African Court of Justice.”

When asked what the applicant’s position was in regard to the application against Justice Kasanga Mulwa, the learned Senior Counsel retorted:

“My Lords, I did say that when the application was made, this letter was not available. So, any counsel preparing an application with this letter would conclude that it would be wrong to include Honourable Justice Mulwa in the application. I also wish to apologise for the inclusion of Justice Mulwa in the application in light of this.”

In response to a further question Dr Kuria confirmed that he was withdrawing the application against Justice Mulwa.

Later, in his winding up remarks, Mr Wanjuki Muchemi, the learned Solicitor General, on behalf of the Attorney General, expressly associated himself with the withdrawals and apology Dr Kuria had made.

What then remains of the application is that the ruling of the Court be set aside by reason of Justice Moijo Ole Keiwua’s participation in it and that the said judge disqualifies himself from further participation by reason of perceived bias. Consequently, the broad issues that remain for the Court to consider and determine are:

- (a) whether Justice Moijo Ole Keiwua was under duty to make the disclosure as contended by the applicant;
- (b) whether Justice Moijo Ole Keiwua was under duty to recuse himself from participating in the hearing of the application for the interim injunction on the ground of perceived bias;
- (c) whether the ruling of this Court granting the interim injunction is null and void by reason of the failure of Justice Moijo Ole Keiwua to make any disclosure and/or to recuse himself from participating in the proceedings.

2. THE APPLICABLE LAW

(a) Jurisdiction

It was not seriously disputed that this Court has jurisdiction to hear and determine an application to set aside its order on the ground that it was made in breach of the fundamental principle of judicial impartiality. Although Dr Kuria repeatedly pointed out that the practice in the Court of Appeal of Kenya and in the House of Lords in the UK whenever there is such an application, was to empanel a different set of judges from those who made the impugned order, he did not go so far as to suggest that this Court as constituted did not have jurisdiction. Even *Mr Otiende Amollo*, learned counsel for the respondents/claimants who broached on the subject of the Court being *functus officio*, turned his argument on whether the application was properly brought within the review jurisdiction. We therefore need not discuss the issue of jurisdiction in any detail. It suffices to say that only through strict adherence to the principle of judicial impartiality³³ can protection of the universally accepted right of every litigant to a fair trial, be enforced. We think that apart from inherent jurisdiction at common law, in appropriate circumstances, this Court can invoke its jurisdiction under article 35 of the Treaty to review its order as unjust if the order was made in violation of the principle.

With regard to an application for a judge to recuse himself from sitting on a Coram, as from sitting as a single judge, the procedure practiced in the East African Partner States, and which this Court would encourage litigants before it to follow, is similar to what was succinctly described by the Constitutional Court of South Africa in *The President of the Republic and others v South African Rugby Football Union and others*, (case CCT 16/98) (the SA Rugby Football Union case). That court said at paragraph 50 of its judgment:

“...The usual procedure in applications for recusal is that counsel for the applicant seeks a meeting in chambers with the judge or judges in the presence of [the] opponent. The grounds for recusal are put to the judge who would be given an opportunity, if sought, to respond to them. In the event of recusal being refused by the judge the applicant would, if so advised, move the application in open court.”

The rationale for and benefit from that procedure is obvious. Apart from any thing else, in practical terms it helps the litigant to avoid rushing to court at the risk of maligning the integrity of the judge or judges and of the court as a whole, without having the full facts, as clearly transpired in the instant case.

In our view, the Solicitor General’s call on the President in the morning of 22 January 2007, fell far short of the accepted practice for it was more akin to intimidation than to an effort to discover the judge’s response to the alleged apprehension concerning his impartiality. We are further strengthened in this view

by the fact that no similar visit was extended to Justice Kasanga Mulwa though he was also subject of the same recusal application.

Where a recusal application comes before a court constituted by several judges, it appears to us that, subject to the judge whose recusal is sought giving his individual decision on the matter, all the judges constituting the Coram for the case have collective duty to determine if there is sufficient ground for the judge to recuse himself from further participation in the case. We agree with the view of the Constitutional Court of South Africa where in the SA Rugby Football Union case (*supra*) it said at paragraph 31:

“If one or more of its members is disqualified from sitting in a particular case, this Court is under duty to say so, and to take such steps as may be necessary to ensure that the disqualified member does not participate in the adjudication of the case.”

Consequently, notwithstanding the deficient approach in the instant case whereby the recusal application was rushed to open court, without following the appropriate usual procedure, we are satisfied that the best course is to dispose of the application in the manner we have just indicated:

- (b) Impartiality and disqualification by reason of bias all counsel for parties and the Amicus Curiae ably addressed us at length and referred us to numerous judicial precedents from diverse jurisdictions which we have read and found extremely helpful in the exposition of the law governing the duty of a 34 judicial officer to administer justice with impartiality and the corresponding duty to disqualify himself from exercising the judicial function by reason of bias. Judicial impartiality is the bedrock of every civilized and democratic judicial system. The system requires a judge to adjudicate disputes before him impartially, without bias in favour of or against any party to the dispute. It is in that context that article 24 of the Treaty ordains that:

Judges of [this] Court shall be appointed by the Summit from among persons recommended by the Partner States who are of proven integrity, impartiality and independence...”

In the same vein, before taking office, every Judge of this Court, like judges of other courts universally, takes the judicial oath undertaking to serve the Community and to do justice in accordance with the Treaty as by law established and in accordance with laws and customs of the Community:

“Without fear or favour, affection or ill will.”

There are two modes in which the courts guard and enforce impartiality. First, a judge, either on his own motion or on application by a party, will recuse himself from hearing a cause before him, if there are circumstances that are likely to undermine, or that appear to be likely to undermine his impartiality in determining the cause. Secondly, through appellate or review jurisdiction, a court will nullify a

judicial decision if it is established that the decision was arrived at without strict adherence to the established principles that ensure judicial impartiality. The first is that “a man ought not to be a judge in his own cause”. The second, which additionally is intended to preserve public confidence in the judicial process, is that “justice must not only be done but must be seen to be done”.

Of the first principle, Lord Browne-Wilkinson said in Pinochet’s case (*supra*) at page 586:

“This principle, as developed by the courts, has two very similar but not identical applications. First it may be applied literally: if a judge is a party to the litigation or has a financial or proprietary interest in its outcome then indeed he is sitting as a judge in his own cause. In that case mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle ... since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial.”

There are two categories of scenarios. In the first, where it is established that the judge is a party to the cause or has a relevant interest in its subject matter and outcome, the judge is automatically disqualified from hearing the cause. In Pinochet’s case (*supra*) the House of Lords held that automatic disqualification applies not only where the judge is directly or indirectly a party or has financial or proprietary interest in the suit, but also where he has some other interest in the outcome of the suit. In a case where an automatically disqualified judge does not recuse himself, the decision or order he makes or participates in, will be set aside, notwithstanding that he did not act with bias.

In the second category, where the judge is not a party and does not have a relevant interest in the subject matter or outcome of the suit, a judge is only disqualified if there is likelihood or apprehension of bias arising from such circumstances as relationship with one party or preconceived views on the subject matter in dispute. The disqualification is not presumed like in the case of automatic disqualification. The applicant must establish that bias is not a mere figment of his imagination. In the SA Rugby Football Union case (*supra*) the Court said in paragraph 45:

“An unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for [a recusal] application.”

For the purposes of this application, we do not find it necessary to delve into the controversy on the test that Dr Kuria addressed us on at length. We think that the objective test of “reasonable apprehension of bias” is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the view of a reasonable, fair-minded and informed member of the

public, that the judge did not (will not) apply his mind to the case impartially. Needless to say, a litigant who seeks disqualification of a judge comes to court because of his own perception that there is appearance of bias on the part of the judge. The court, however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair-minded and informed about all the circumstances of the case would be.

3. CONSIDERATION OF THE ISSUES

Much as the applicant's case is grounded on the judge's failure to make disclosure to the parties at the commencement of hearing on 24 November 2006, the applicant has not been explicit as to what the judge was under duty to disclose. The initial pleading in the Notice of Motion was that the judge failed to disclose:

- (1) his interest – (paragraph (e));
- (2) material fact that he was related to the Republic of Kenya in a manner which rendered it impossible for him to give a fair hearing to the Attorney General – (paragraph i);
- (3) facts that he was suspended from performance of functions of Judge of Appeal and that a tribunal was appointed to investigate allegations that he was involved in corruption, unethical practice, and absence of integrity – (paragraphs g, h and l).

Since counsel for the applicant conceded that the judge did not have any interest in the case and chose not to rely on actual “animosity” but on only perception of possible “animosity” towards the Government, we only need to consider if the judge was under obligation to disclose the third set of facts.

We have no hesitation in holding that the judge was not under any such obligation. A judicial officer is required to disclose facts that may raise apprehension of possible bias on his part, in order to show that he has no actual bias and to give opportunity to a party who considers that he might be prejudiced, to exercise the right to apply for the judge to recuse himself or to waive that right. The disclosure is not a precondition for the application to be made. We were not persuaded by Dr Kuria's 36 contention that disclosure is for public consumption in order to retain its confidence in the judiciary. A litigant who has knowledge of such facts is at liberty to make the application even in absence of their disclosure by the judge. It follows that an applicant who relies on the judge's failure to disclose material facts must show that those facts were not within his or his legal advisor's knowledge. See Pinochet's case (*supra*). Failure of a judge to disclose facts that are within public knowledge cannot be a ground on which a reasonable member of public would apprehend bias. See SA Rugby Football Union case (*supra*) (paragraph 93).

The suspension of Justice Moiwo Ole Keiwua and the appointment of a tribunal to investigate his conduct, have been matters of public knowledge since they were published in the Kenya Gazette of 15 October 2003, not to mention publications in mass media. Besides, both the appointment of the tribunal and the suspension of the judge were acts done by the Government of Kenya to which the applicant is the principal legal advisor. It is reasonable to assume that he was consulted on those matters. In any case it was not suggested that the facts were not in his knowledge. If it was those facts that gave rise to any apprehension or the perception of possible bias on the part of Justice Moiwo Ole Keiwua, then the Attorney General was in a position to object to the judge sitting when the case came up for hearing on 24 November 2006. His omission to do so leads to only two possible inferences. Either he opted to waive his right to object or he did not harbour the apprehension or think that a reasonable, fair-minded and informed member of the public would perceive such apprehension.

It was strenuously argued for the applicant that there was no waiver and that the applicant did not lose the right to raise the objection at a later stage as he eventually did in this application. Significantly, however, no attempt was made to explain the omission.

From the authorities we have consulted, the prevalent view, with which we agree, is that a litigant seeking disqualification of a judge from sitting on the ground of appearance of bias must raise the objection at the earliest opportunity. The Court of Appeal of Kenya in *Ole Keiwua v Chief Justice of Kenya and others* [2006] KLR, expressed the same view thus:

“We appreciate the fact that a party to any judicial proceedings has a right to object to any judge or judicial officer sitting if he or she has good reason for raising such objection. However, whoever intends to raise such objection is obliged to raise his objection at the earliest opportunity.”

However, our attention was drawn to an earlier decision of the same court in *King Woollen Mills Limited and another v Standard Chartered Financial and another* civil application number 102 of 1994, where it observed with approval that in a previous decision it had emphasised that “delay in bringing the [recusal] application did not defeat the duty or obligation of [the respondent in that application]”. *Mr Kilonzo* submitted, and we are inclined to agree, that the decision of 2006 is to be preferred as the latest stand of that court on the matter.

In *Administrative Law* (8 ed) by HWR Wade and CF Forsyth the learned authors wrote at page 455:

“The right to object to a disqualified adjudicator may be waived, and this may be so even where the disqualification is statutory. The court normally insists that the objection shall be taken as soon as the party 37 prejudiced knows the facts which entitle him to object. If, after he or his advisors know of the disqualification, they let the proceedings to

continue without protest, they are held to have waived their objection and the determination cannot be challenged.”

The learned authors cite as authority for that proposition *Locabail (UK) Limited v Bayfield Properties Limited and another* [2000] QB 451.

We respectfully agree that a litigant who has knowledge of the facts that give rise to apprehension of possibility of bias ought not to be permitted to keep his objection up the sleeve until he finds out that he has not succeeded. The court must guard against litigants who all too often blame their losses in court cases to bias on the part of the judge. In the SA Rugby Football Union case (*supra*) paragraph 68 the court observed:

“Success or failure of the government or any other litigant is neither ground for praise or for condemnation of a court. What is important is whether the decisions are good in law, and whether they are justifiable in relation to the reasons given for them. There is unfortunate tendency for decisions of courts with which there is disagreement to be attacked by impugning the integrity of the judges, rather than by examining the reasons for the judgment ... Decisions of our courts are not immune from criticism. But political discontent or dissatisfaction with the outcome of the case is no justification for recklessly attacking the integrity of judicial officer.”

In the instant case the applicant's position in this regard is exacerbated by the events following the granting of the interim injunction. The applicant did not only file the response to the reference within the abridged time he had undertaken to the Court, but according to the information disclosed in his application, he was involved in a parallel process of amending the Treaty. We note that clearly the amendment is a direct reaction to the impugned ruling of the Court. In his response to the reference filed on 30 December 2006, the applicant continues to protest the Court's jurisdiction, an issue that was already decided, but does not hint at, let alone raise, any objection to the sitting of any member of the Court on ground of any appearance or perception of bias. He chooses to do so only when the case is moving close to hearing and uses the opportunity to inform the Court through the affidavit of Dr Wario that the amendments to the Treaty have been ratified by the Republic of Kenya and awaits ratification by the other two Partner States to come into force.

While we are anxious to refrain from commenting on the merits and/or demerits of the process of amending the Treaty in reaction to an interim Court order, we are constrained to say that any reasonable court would conclude as we are inclined to do, that this application was brought more out of a desire to delay the hearing of the reference than a desire to ensure that the applicant receives a fair hearing. In our view, this is tantamount to abuse of court process, and we would be entitled to dispose of the application on that finding alone. However, in the peculiar circumstances of this case, we think that it is prudent to consider if on the facts complained of, Justice Moijo Ole Keiwua ought to have recused himself from

the hearing on 24 November 2006, and/or to recuse himself from any further hearing of the reference and applications therein.

As we have already noted, the facts the applicant finally relies on are not in dispute. They are that more than three years ago, in October 2003, Justice Moiwo Ole Keiwua was suspended from duty as a Judge of Appeal in the Republic of Kenya and that a tribunal was appointed to investigate his conduct. The suspension and the appointment were made pursuant to the provisions of section 62 of the Constitution of the Republic of Kenya. To this may be added the fact that in November 2006, a reference was filed in this Court in which the applicant, the Attorney General of Kenya, in his official capacity as the Legal Adviser of the Government, was cited as the first respondent.

The applicant's case was that from those facts members of the public must have perceived reasonable apprehension or suspicion that the judge would be biased. By way of elaboration Dr Kuria argued that the perception was based on the assumption that as a human being the judge would harbour animosity against the Government that suspended him from his duty and subjected him to the resultant disadvantages and would seek "to hit back" by deciding the case against the Government of Kenya represented by the applicant.

For the respondents, several counsel countered that argument variously. *Mr Kilonzo* submitted that the perception contrived by the applicant was not the perception a reasonable member of the public would conceive. He opined that it was more likely to conceive a perception that judges on suspension would want to ingratiate themselves with the Government in order to get reprieve. However, the main thrust of his reply was that the Court had to view the facts through the eyes of a fair-minded and well informed member of public. He forcefully argued that such a person, would not perceive a judge of the ability, skills and experience of the President of this Court adjudicating a case unfairly merely because a tribunal was appointed under section 62 of the Kenya Constitution to investigate allegations against him. Another point highlighted by several other counsel for the respondents was that the alleged animosity was farfetched as neither the President nor the Government were responsible for the allegations that led to the suspension.

It is indisputable that different minds are capable of perceiving different images from the same set of facts. This results from diverse factors. A "suspicious mind" in the literal sense will suspect even where no cause for suspicion exists. Unfortunately this is a common phenomenon among unsuccessful litigants. That is why, as we pointed out earlier in this ruling, the mind envisaged in the test to determine perception of possible or likely bias on the part of a judge is a reasonable, fair and informed mind. We think that applying that mind to the facts of this case would not produce the perception canvassed by the applicant.

In our opinion, a reasonable person would not perceive that a judge whose conduct is under investigation, would risk conducting an unfair adjudication against the very authority investigating his conduct. A reasonable and informed person, knowing that the judge sits in a panel of five judges, trained and sworn to administer justice impartially, would not in our view, perceive that the judge would skim to single handedly deny the applicant a fair hearing or justice. We think a reasonable, informed and fairminded member of the public, appreciating the subject matter and nature of the reference, would credit the judge with sufficient intelligence not to indulge in futile animosity.

In view of the foregoing, we find that the applicant has not satisfied us that Justice Moiwo Ole Keiwua was disqualified from sitting in the proceedings of the Court 39 held on the 24 and 25 November 2006 and from participating in the resultant ruling of 27 November 2006. Similarly, by his admission through the learned Solicitor General, Mr Wanjuki Muchemi and Dr Kamau Kuria SC, Justice Kasanga Mulwa was not disqualified. We therefore hold that the said ruling was not vitiated by their participation and reject the prayer for setting it aside.

In response to the prayer that the judges disqualify themselves from further hearing of the reference and applications therein, Justice Moiwo Ole Keiwua has made a response declining to do so. We agree with his position as there is no basis for the prayer. His response shall be deemed to be incorporated in this ruling. In view of the withdrawal of the application against Justice Kasanga Mulwa he thought it unnecessary to respond.

Accordingly, the prayer that the two judges disqualify themselves from further hearing of the reference and applications therein, is also rejected. In conclusion, we would like to borrow the words of the Constitutional Court of South Africa in the SA Rugby Football Union case (*supra*) paragraph 104:

“While litigants have the right to apply for the recusal of judicial officers where there is a reasonable apprehension that they will not decide a case impartially, this does not give them the right to object to their cases being heard by particular judicial officers merely because they believe that such persons will be less likely to decide the case in their favour ...The nature of the judicial function involves the performance of difficult and at times unpleasant tasks. Judicial officers are nonetheless required to ‘administer justice to all persons alike without fear, favour or prejudice in accordance with the Constitution and the law. To this end they must resist all manner of pressure, regardless of where it comes from. This is the constitutional duty common to all judicial officers. If they deviate, the independence of the judiciary would be undermined and in turn the Constitution itself.”

In article, 6 of the Treaty the Partner States agreed to include among the fundamental principles to govern the achievement of the objectives of the Community the principle of the Rule of Law. In addition, they agreed to establish this Court which they mandated under article 23 to be the judicial body that “shall ensure the adherence to law in the interpretation and application of and compliance with the Treaty.” One of the cardinal rules in the doctrine of the Rule of Law is respect of court decisions. If that rule is deviated from then the principle

becomes hollow and remains on paper only. In the case of the Community, the Treaty and all it seeks to achieve will stand on sinking sand.

In the result we dismiss the application with costs to the respondents.

KEIUWA P: I agree with the ruling of the Court. However, as it is the practice in these matters, I would like to make a personal statement. Firstly, there is a matter I think the public must know. On the morning of 22 January 2007 at about 9.00am Counsel representing the Attorney General, who is the applicant herein came to see me in my chambers. They were led by the learned Solicitor General Mr Wanjuki Muchemi with Dr Gibson Kamau Kuria Senior Counsel and Ms Muthoni Kimani Learned Deputy Solicitor General.

As it later transpired, the purpose of the visit was to let me know of an application by the Attorney General calling for the disqualification of Judge Mulwa and I. Counsel enquired at that late hour whether we would consider withdrawing from the bench that was that morning assigned to conduct the Scheduling Conference. I was informed that if we acceded to the demand then the application would not be filed. I took the opportunity to let the Counsel know that Judge Mulwa's suspension had been revoked and informed them that he had a letter from Mr Muthaura wishing him luck with the East African Court of Justice. I realized none of the learned Counsel wanted to comment on these revelations. I informed them I would consult the other members of the Court as I realized it was futile to engage them any further. This attitude appears to persist through out the hearing of the application, with Dr Kuria insisting that his case was; once he was able show the suspension and appointment of Tribunals; nothing that happened subsequently mattered.

I was suspended from the Kenya Court of Appeal and as can be seen those facts are in the public domain having been so publicized via Kenya Gazette Notice number 8828 of 2003. This fact has always been part of public record in High Court case miscellaneous civil application number 1298 of 2004 and in Court of Appeal civil application number Nairobi 202 of 2005 (UR 119/2005).

The record shows that the complainants are not the Government of Kenya or any of its departments or anyone remotely connected with it. The Attorney General is represented by his Chief Parliamentary Counsel in the Constitutional Tribunal while *Mr Ombwayo* Principal State Counsel represents the respondents in those cases. The Attorney General Mr Amos Wako personally wrote to the Tribunal on 6 May 2004.

Mr Wako, at the time when he appeared personally before this Court on 24 November 2007, must surely have been aware of my suspension. These revelations and the reluctance on the part of the Attorney General to come out on what is clearly within his personal knowledge make curious the remarks by his Solicitor General that the application was not made lightly.

It is quite clear to me that it is not any withholding of any information on my part, which propelled the Attorney General to seek disqualification.

Let me confirm that contrary to the submission of Counsel I have never felt the need to be antagonistic either against the Attorney General of Kenya or the Government.

This is because the Government was in relation to my suspension fulfilling a constitutional obligation.

I do not, in these circumstances, agree that I had any duty to disclose any information to anyone. I accordingly decline to disqualify myself from the hearing of the reference.

For the appellant:

Appeared in person

For the respondent:

Mr Mutula Kilonzo, Mr Otiende Amollo and Mr Ombwayo

**ANYANG' NYONG'O AND OTHERS V
ATTORNEY GENERAL OF THE REPUBLIC OF KENYA
AND OTHERS**

THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

REFERENCE NUMBER 1 OF 2006

[1] East African Community Treaty – Composition of the Legislative Assembly – To be by election – Meaning of election – Article 50 of the Treaty establishing the East African Community.

Editor's Summary

This was a reference under article 30 of the Treaty for the Establishment of the East African Community (the Treaty), in which the claimants sought to invoke the Court's jurisdiction under article 27 of the Treaty. They contended that the process in which the first, second and third interveners were deemed to be elected as Kenya's nine members of the East African Legislative Assembly (the Assembly), and the rules made by the Kenya National Assembly and invoked for effecting the said process infringe the provisions of article 50 of the Treaty. They made prayers, for the Court to interpret and apply article 50 of the Treaty to the said process and rules and declares them to be void, and that costs of the reference be awarded to the claimants.

Under article 2 of the Treaty, the contracting parties, namely the United Republic of Tanzania, the Republic of Kenya and the Republic of Uganda, (the Partner States) established among themselves an East African Community (the Community) and under article 9 established diverse organs and institutions of the Community. One of the eight organs established under the Treaty is the East African Legislative Assembly (the Assembly), which is the legislative organ of the Community. It consists of twenty-seven elected members and five ex officio members. Article 50 of the Treaty provided that the National Assembly of each Partner State shall elect nine members of the Assembly in accordance with such procedure as it may determine. The article also stipulated that the elected members shall, as much as feasible, be representative of specified groups, and sets out the qualifications for election. When the first Assembly was due to be constituted in 2001, the National Assembly of Kenya, made 'The Treaty for the Establishment of the East African Community (Election of Members of the Assembly) Rules 2001' (the election rules). The first nine members of the Assembly, whose term expired on 29 November 2006, were elected under those rules. On 25 and 26 October 2006, pursuant to the election rules, the House Business Committee of the

National Assembly deliberated upon lists of names presented to it as persons that were nominated by the three parliamentary political parties entitled to nominate candidates for election to the Assembly. The parties were the Kenya African National Union (KANU), the Forum for the Restoration of Democracy – People (FORD – P), and the National Rainbow Coalition (NARC). All together, five lists were presented to the Committee. Two lists, of three nominees each, were from KANU; one list of one nominee only, was from FORD – P. Each of the other two lists contained five nominees of NARC. One was submitted by the party leader through the Clerk to the National Assembly as provided by the election rules. The other was presented to the Committee, in its afternoon session on 25 October by the Government Chief Whip.

The Committee unanimously approved the only nomination from FORD – P. In the course of the deliberations, KANU withdrew one of its lists and the Committee approved, also unanimously, the three nominees on the remaining list. Finally, with regard to the nominations from NARC, the Committee considered the two lists and then, according to its minutes, “resolved to consider the list submitted by the Government Chief Whip for purposes of nomination...” Although it was not expressly stated in the minutes, and no reasons therefor were recorded, the Committee thereby impliedly rejected the nominees on the list submitted by the party leader of NARC, except for one Gervase Buluma Kafwa Akhaabi who was on both lists.

On 26 October 2006, the Committee, after amending the previously approved list of KANU nominees, approved 9 names as “duly nominated to serve” in the Assembly and “further resolved that the list be tabled before the House” in accordance with the Election Rules.

The list was accordingly tabled in the National Assembly on that day in a Ministerial Statement by the Vice President of the Republic of Kenya, as Leader of Government Business in the National Assembly and Chairman of the House Business Committee. Thereafter the names were remitted to the third respondent as members of the Assembly elected by the National Assembly of Kenya.

On 9 November 2006, nearly three weeks before the second Assembly was due to commence, the claimants filed the reference in the Court with an *ex parte* interlocutory application for an interim injunction to prevent the said nine persons from taking office as members of the Assembly until determination of the reference. By order of the Court the interlocutory application was heard *inter partes* on 24 and 25 November 2006. The Court delivered its ruling on the application and on two objections raised therein on 27 November 2006, in which *inter alia*, it granted the interim injunction restraining the third and fourth respondents from recognizing the nine nominees as duly elected members of the Assembly until disposal of the reference.

From the pleadings, the court identified for determination the issues whether the complainants had disclosed any cause of action within the meaning of article 30 of the Treaty; an election had been undertaken within the meaning of article 50 of the Treaty; the Kenya Election Rules i.e. The Treaty for the Establishment of the East African Community (Election of Members of the Assembly) Rules 2001, complied with article 50 of the Treaty?

Held – The East African Community Treaty, being an international treaty among three sovereign states, is subject to the international law on interpretation of treaties, the main one being “The Vienna Convention on the Law of Treaties”. The articles of the Vienna Convention on the Law of Treaties that were of particular relevance to the reference were article 26 that embodies the principle of *pacta sunt servanda*, article 27 that prohibits a party to a treaty from invoking its internal law as justification for not observing or failing to perform the treaty and article 31, which sets out the general rule of interpretation of treaties.

A cause of action is a set of facts or circumstances that in law give rise to a right to sue or to take out an action in court for redress or remedy. *Auto Garage v Motokov* number 3 [1971] EA 514 followed. A cause of action created by statute or other legislation does not necessarily fall within the same parameters of actions in tort and suits for breach of statutory duty or breach of contract. Its parameters are defined by the statute or legislation which creates it. The reference was not an action seeking remedy for violation of the claimants’ common law rights. It was an action brought for enforcement of provisions of the Treaty through a procedure prescribed by the Treaty.

The Treaty at articles 28, 29 and 30 provided for a number of actions that would be brought to the Court for adjudication. Under article 28(1) a Partner State could refer to the Court, the failure to fulfill a Treaty obligation or the infringement of a Treaty provision by another Partner State or by an organ or institution of the Community. Under article 28(2) a Partner State could also make a reference to the Court to determine the legality of any Act, regulation, directive, decision or action on the ground that it is *ultra vires* or unlawful or an infringement of the Treaty or any rule of law relating to its application or amounts to a misuse or abuse of power. Under article 29 the Secretary General could also, subject to different parameters, refer to the Court failure to fulfill a Treaty obligation, or an infringement of a provision of the Treaty, by a Partner State. Under article 30 subject to the provisions of article 27 of the Treaty, any person resident in a Partner State could refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action was unlawful or is an infringement of the provisions of this Treaty.

None of the provisions in the three articles required directly or by implication the claimant to show a right or interest that was infringed and/or damage that was suffered as a consequence of the matter complained of in the reference and there was no legal basis on which the Court would import or imply such requirement into article 30 of the Treaty.

If the only subject matter of the reference were those circumstances surrounding the substitution of the third interveners for the said four claimants, the Court would have no jurisdiction over the reference.

By virtue of article 34 of the Treaty the East African Court of Justice has the primacy if not supremacy of jurisdiction over the interpretation of provisions of the Treaty.

Article 30 of the Treaty confers on a litigant resident in any Partner State the right of direct access to the Court for determination of the issues set out therein. It is therefore not necessary that before bringing a reference under article 30, a litigant has to “exhaust the local remedy” there being no local remedy to exhaust in any event.

Article 50 imports two basic concepts. One concept is that the article imposes on each National Assembly the function of electing nine members of the Assembly from the respective Partner States, with a discretionary power to determine the procedure it will follow in executing that function. The other concept is that the article confers on the National Assembly of each Partner State the responsibility, with unfettered discretion, to determine how the nine members of the Assembly from the respective Partner States are to be elected.

The overriding object and purpose of article 50 was to prescribe a special mode of constituting one of the categories of membership of the Assembly. This was done by providing in express, unambiguous and mandatory terms that the section of the Assembly comprising 27 members shall be constituted by members elected severally by the National Assemblies of the Partner States, each of which is entitled to elect nine members. According to the ordinary meaning of the expression “the National Assembly of each Partner State shall elect nine members of the Assembly”, the National Assembly of each Partner State is unconditionally assigned the function of electing nine members of the Assembly. Article 50 constitutes the National Assembly of each Partner State into “an electoral college” for electing the Partner State’s nine representatives to the Assembly. We think that there can be no other purpose of naming the National Assembly in this regard other than to constitute it into an electoral college.

The rest of the provisions of article 50 do not add to or subtract from that assignment of election. They only serve to leave two matters in the National Assembly’s discretion. First, while the article provides that the nine elected

members shall as much as feasible be representative of the specified groupings, by implication it appears that the extent of the feasibility of such representation is left to be determined in the discretion of the National Assembly. Secondly, the National Assembly has the discretion to determine the procedure it has to follow in carrying out the election.

The decision to constitute the National Assembly of each Partner State into an electoral college was a deliberate step towards establishing a legislature comprising people's representatives. The National Assembly, being an institution of people's representatives, is next to the people themselves, the second best forum for electing such representatives.

The discretion of determining the procedure of electing the representatives does not include an option for the National Assembly to assign the function to any other body. That would offend the well established principle articulated in the maxim: "*Delegata potestas non potest delegari*" (a delegated power cannot be delegated).

The ordinary meanings of the words "election" and "to elect" are "choice" and "to choose" respectively; and that in the context of article 50 the words relate to the National Assembly choosing or selecting persons to hold political positions. The phenomenon of multiple meanings of words makes interpretation of documents a very difficult task; but the task is not insurmountable. Rules of interpretation have been designed to ease the burden, hence the need to invoke them. There are two trite rules of international law, which emanate from the principle of *pacta sunt servanda*, namely; treaty provisions are presumed to have meaning and must not be construed as void for uncertainty, in the way contracts between private persons may be construed at municipal law, and, the parties to a treaty cannot be taken to have intended an absurdity.

It would lead to unnecessary uncertainty, if not to absurdity, if article 50 were construed to mean that the parties to the Treaty intended to attach no meaning to the words "election" and "to elect" used in article 50, leaving it to each National Assembly to adopt its preferred meaning of the words through the rules of procedure it determines. Ordinarily a reference to a democratic election of persons to political office is understood to mean election by voting. In all three Partner States, the National Assembly has the function of electing its Speaker and Deputy Speaker. It executes that function by voting in one form or another.

It is very unlikely that in adopting article 50, the parties to the Treaty contemplated, let alone intended, that the National Assembly would elect the members of the Assembly other than through voting procedure. An election through voting may be accomplished using such diverse procedures as secret ballot, show of hands or acclamation. The electoral process may or may not involve such preliminaries as campaigns, primaries and/or nominations. An election may be

contested or uncontested. The bottom line for compliance with article 50 is that the decision to elect is a decision of and by the National Assembly.

The National Assembly of Kenya did not undertake or carry out an election within the meaning of article 50 of the Treaty. In determining whether the election rules constitute an infringement of article 50 of the Treaty it is immaterial that the claimants or any of them may have previously regarded the election rules as valid or may have done anything or taken any step in pursuance of their provisions. Once a question of infringement of the Treaty is properly referred to the Court under article 30, the question ceases to be of purely personal interest and the court would be failing in its duty under article 23 if it refused to determine the question on the ground of the claimant's previous conduct or belief. The doctrine of 46 estoppel cannot be raised against the operation of statute. *Maritime Electric Company Limited v General Dairies Limited* [1937] 1 All ER 748; *Southend-on-Sea Corporation v Hodgson (Wickford) Limited* [1961] 2 All ER 46 and *T Tarmal Industries v Commissioner of Customs and Excise* [1968] EA 471 followed.

Estoppel cannot be invoked to prevent an inquiry into an alleged infringement of the Treaty. If the rules made in exercise of power conferred by article 50 are ultra vires, they cannot be saved on the ground that the claimants previously regarded them as intra vires.

To the extent that the Kenyan election rules provide in rule 4, that the National Assembly shall elect the nine members of the Assembly "according to the proportion of every party in the National Assembly" there is partial compliance with article 50. However, the apparent absence of any provision to cater for gender and other special interest groups is a significant degree of non-compliance, notwithstanding the discretion of the National Assembly in determining the extent and feasibility of the representation. The major deviation from article 50 by the Kenya election rules is that the election rules do not provide for the National Assembly to elect the members of the Assembly.

Rule 5 provides for the nomination of candidates by the political parties and sets out the procedure for submitting nomination papers to the House Business Committee.

The National Assembly of any democratic sovereign state has the powers of regulating its conduct through rules of procedure by whatever name called. Once made and adopted, they are binding until revoked, amended or otherwise modified by the National Assembly itself. Ordinarily what the National Assembly does in accordance with such rules is lawful and valid. However, a state, which in exercise of its sovereign power binds itself to an international treaty, may end up facing conflicting demands, namely the demand to abide by its treaty obligations and the demand to abide by its own rules that conflict with the former. A state party to a

treaty cannot justify failure to perform its treaty obligation by reason of its internal inhibitions. It cannot be lawful for a state that with others voluntarily enters into a treaty by which rights and obligations are vested, not only on the state parties but also on their people, to plead that it is unable to perform its obligation because its laws do not permit it to do so.

The National Assembly of Kenya did not undertake an election within the meaning of article 50 of the Treaty, and that the election rules in issue infringe the same article.

Cases referred to in judgment

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means explained; “**F**” means followed; “**O**” means overruled)

East Africa

Auto Garage v Motokov number 3 [1971] EA 514 – **F**

Ismail Serugo v Kampala City Council and Attorney General constitutional appeal number 2 of 1998 (UR)

Jaramogi Oginga Odinga v Zachariah R Chesoni and Attorney General miscellaneous application number 602 of 1992 (UR)

T Tarmal Industries v Commissioner of Customs and Excise [1968] EA 471 – **F**

United Kingdom

Maritime Electric Company Limited v General Dairies Limited [1937] 1 All ER 748 – **F**
R v Secretary of State for Transport ex parte Factortame Limited number 2 [1991] 1 AC 603

Southend-on-Sea Corporation v Hodgson (Wickford) Limited [1961] 2 All ER 46 – **F**

St Aubyn (LM) v Attorney General [1951] 2 All ER 473

India

Indira Sawhney v Union of India JT [1999] (9) SC 557: [2000] 1 SCC 168

Others

Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen [1963] ECR 1

Amministrazione delle Finanze dello Stato v Simmenthal [1978] ECR 629

Flaminio Costa v ENEL [1964] ECR 585

Judgment

KEIWUA P, MULENGA VP, RAMADHANI, MULWA AND NSEKELA JJ: This is a reference under article 30 of the Treaty for the Establishment of the East African

Community (the Treaty), in which the above named claimants seek to invoke this Court's jurisdiction under article 27 of the Treaty. They contend that the process in which the above named first, second and third interveners were deemed to be elected as Kenya's nine members of the East African Legislative Assembly (the Assembly), and the rules made by the Kenya National Assembly and invoked for effecting the said process infringe the provisions of article 50 of the Treaty. They make diverse prayers, but we need refer to only the pertinent ones with which this judgment is concerned and which we would paraphrase as follows:

- (a) That this Court interprets and applies article 50 of the Treaty to the said process and rules and declares them to be void;
- (b) That costs of the reference be awarded to the claimants. We consider the rest of the prayers are not maintainable under article 30.

1. BACKGROUND

Under article 2 of the Treaty, the contracting parties, namely the United Republic of Tanzania, the Republic of Kenya and the Republic of Uganda, (the Partner States) established among themselves an East African Community (the Community) and under article 9 established diverse organs and institutions of the Community. One of the eight organs established under the Treaty is the East African Legislative Assembly (the Assembly), which is the legislative organ of the Community. It consists of twenty-seven elected members and five ex officio members.

Article 50 of the Treaty provides that the National Assembly of each Partner State shall elect nine members of the Assembly in accordance with such procedure as it may determine. The article also stipulates that the elected members shall, as much as feasible, be representative of specified groups, and sets out the qualifications for election.

When the first Assembly was due to be constituted in 2001, the National Assembly of Kenya, "in exercise of the powers conferred by article 50(1) of the Treaty" made The Treaty for the Establishment of the East African Community (Election of Members of the Assembly) Rules 2001" (the election rules). The first nine members of the Assembly, whose term expired on 29 November 2006, were elected under those rules.

On 25 and 26 October 2006, pursuant to the election rules, the House Business Committee of the National Assembly deliberated upon lists of names presented to it as persons that were nominated by the three parliamentary political parties entitled to nominate candidates for election to the Assembly. The parties are the Kenya African National Union (KANU), the Forum for the Restoration of Democracy – People (FORD – P), and the National Rainbow Coalition (NARC).

All together, five lists were presented to the Committee. Two lists, of three nominees each, were from KANU; one list of one nominee only, was from FORD – P. Each of the other two lists contained five nominees of NARC. One was submitted by the party leader through the Clerk to the National Assembly as provided by the election rules. The other was presented to the Committee, in its afternoon session on 25 October by the Government Chief Whip.

The Committee unanimously approved the only nomination from FORD – P. In the course of the deliberations, KANU withdrew one of its lists and the Committee approved, also unanimously, the three nominees on the remaining list. Finally, with 48 regard to the nominations from NARC, the Committee considered the two lists and then, according to its minutes, “resolved to consider the list submitted by the Government Chief Whip for purposes of nomination...” Although it is not expressly stated in the minutes, and no reasons therefor were recorded, the Committee thereby impliedly rejected the nominees on the list submitted by the party leader of NARC, except for one Gervase Buluma Kafwa Akhaabi who was on both lists.

On 26 October 2006, the Committee, after amending the previously approved list of KANU nominees, approved:

- (1) Tsungu Safina Kwekwe,
- (2) Kimura Catherine Ngima,
- (3) Karan Clarkson Otieno,
- (4) Lotodo Augustine Chemonges,
- (5) Akhaabi Gervase,
- (6) Bonaya Sarah Talaso,
- (7) Nakuleu Christopher,
- (8) Abdi Abdirahin Haither, and
- (9) Reuben Onserio Oyondi as “duly nominated to serve” in the Assembly and “further resolved that the list be tabled before the House” in accordance with the Election Rules.

The list was accordingly tabled in the National Assembly on that day in a Ministerial Statement by the Vice President of the Republic of Kenya, as Leader of Government Business in the National Assembly and Chairman of the House Business Committee. Thereafter the names were remitted to the third respondent as members of the Assembly elected by the National Assembly of Kenya.

On 9 November 2006, nearly three weeks before the second Assembly was due to commence; the claimants filed the reference in this Court with an *ex parte* interlocutory application for an interim injunction to prevent the said nine persons

from taking office as members of the Assembly until determination of the reference. By order of the Court the interlocutory application was heard *inter partes* on 24 and 25 November 2006. The Court delivered its ruling on the application and on two objections raised therein on 27 November 2006, in which *inter alia*, it granted the interim injunction restraining the third and fourth respondents from recognizing the nine nominees as duly elected members of the Assembly until disposal of the reference.

2. PARTIES TO THE REFERENCE

All the claimants are resident in Kenya. In the reference, the first and second claimants are stated to be suing as officials of the Orange Democratic Movement (ODM) and the fourth and fifth claimants are stated to be suing as officials of the Liberal Democratic Party (LDP). The third, sixth and seventh claimants are stated to be suing as officials of NARC, Democratic Party (DP) and Forum for Restoration of Democracy in Kenya (FORD – K) respectively. But despite highlighting the stated official capacities in the pleading, nothing significant turned on them during the trial and therefore, in this judgment, we⁴⁹ consider the said claimants in the same individual capacities as the eighth, ninth, tenth and eleventh claimants. It should be mentioned, however, that the third, ninth, tenth and eleventh claimants were the NARC nominees on the list submitted by the party leader, which was inexplicably rejected by the House Business Committee.

Six respondents were initially cited in the reference. At the hearing of the aforesaid interlocutory application the second, fifth and sixth respondents objected to their being joined to the case, and the Court upheld the objection in its ruling delivered on 27 November 2006, on the ground that the only matters whose legality the Court had to determine were those done by Kenya as a Partner State through its National Assembly. They were struck out, leaving the three respondents named above.

Following the interim injunction, which took immediate effect, the nine affected nominees and the KANU party filed separate applications under article 40 of the Treaty and rule 35 of the Court Rules, for leave to intervene in the reference. By a consolidated consent order dated 17 January 2007, leave to intervene limited to supporting the respective cases of the claimants or the respondents was granted. The first interveners are the three KANU nominees, the second is the nominee of FORD – P and the third interveners are the five persons approved by the House Business Committee as the NARC nominees. The fourth interveners are officials of KANU party.

3. PLEADINGS AND ISSUES

There are numerous averments in the reference, many of which are unnecessary, notwithstanding counsel's explanation that their purpose is to show the full context of the claimants' case. With due respect to learned counsel, we are constrained to observe that much of the "over-pleading" has led to some degree of confusion in regard to the jurisdiction of this Court and the claimants' cause of action. Be that as it may, in our view, the claimants' core pleading that leads to the prayers we referred to at the beginning of this judgment is captured in two paragraphs, which read thus:

- "(29) It is the contention of the claimants that the whole process of nomination and election adopted by the National Assembly of Kenya was incurably and fatally flawed in substance, law and procedure and contravenes article 50 of the East African Community Treaty in so far as no election was held nor debate allowed in Parliament on the matter.
- (30) The claimants also contend that any such rules that may have been invoked by the Kenya National Assembly which do not allow election directly by citizens or residents of Kenya or their elected representatives is null and void for being contrary to the letter and spirit of the Treaty."

In a nutshell, the response of the first respondent is premised on the following four propositions as basic pleas, namely, that:

- (a) In 2001, the Kenya National Assembly, pursuant to article 50 of the Treaty, determined its own procedure for election of the nine members of the Assembly in form of the election rules, which embody the democratic principle of proportional representation.
- (b) In October 2006, the National Assembly, acting through its House Business Committee, in accordance with its Standing Orders and the election rules, went through the process of electing the nine members to the second Assembly.
- (c) Neither the election rules nor the process of electing the nine members constitute an infringement of the Treaty or are otherwise unlawful.
- (d) The reference does not disclose a cause of action.

The third and fourth respondents plead jointly that no cause of action is disclosed against them as they were not privy to the activities of the Kenya National Assembly about which the reference complains. In the alternative they plead that the cause of action, if any, ceased when they obeyed the interim injunction, which had been the purpose for their being made parties in the case.

Out of these pleadings, the Court framed the following three broad issues:

- (1) Have the complainants disclosed any cause of action within the meaning of article 30 of the Treaty?

- (2) Was an election undertaken within the meaning of article 50 of the Treaty?
- (3) Do the Kenya Election Rules i.e. The Treaty for the Establishment of the East African Community (Election of Members of the Assembly) Rules 2001, comply with article 50 of the Treaty?

4. EVIDENCE

The main facts relied on by all the parties, most of which are outlined in the background section of this judgment, are not in controversy. Only one witness, Yvonne Khamati, the tenth claimant, gave oral evidence and was cross-examined at length by counsel for all the parties. ... Where necessary, we shall consider the evidence that is not reflected in the background section of the judgment, as we discuss the framed issues.

The Advocates for the claimants, the first respondent and the first interveners filed written submissions. In addition, the respective counsel for all the parties as well as for the amicus curiae made oral submissions at the hearing.

5. APPLICABLE PRINCIPLES

The Treaty describes the role and jurisdiction of this Court in two distinct but clearly related provisions. In article 23, the Treaty provides:

“The Court shall be a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with this Treaty.”

It then provides thus in article 27(1):

“The Court shall initially have jurisdiction over the interpretation and application of this Treaty.”

The Treaty, being an international treaty among three sovereign states, is subject to the international law on interpretation of treaties, the main one being “The Vienna Convention on the Law of Treaties”. The three Partner States acceded to the Convention on different dates; (Uganda on 24 June 1988, Kenya on 9 November 1988 and Tanzania on 7 April 1993). The articles of the Convention that are of particular relevance to this reference are article 26 that embodies the principle of *pacta sunt servanda*, article 27 that prohibits a party to a treaty from invoking its internal law as justification for not observing or failing to perform the treaty and article 31, which sets out the general rule of interpretation of treaties. Article 31 reads:

“... Learned counsel for the claimants urged that in addition to seeking guidance from the Vienna Convention in interpreting the Treaty, the Court should, in respect of article 50 of the Treaty, apply what he referred to as the principle of equivalence, which ensures 52 that in the interpretation and application of rights and obligations created under a treaty there is equivalence in the states that are bound by the treaty. In other words, treaty provisions must be uniformly interpreted and applied in the states that are parties to the treaty.”

For the first respondent on the other hand, the Court was urged to exercise its jurisdiction with care bearing in mind the historical perspective of the Treaty with particular reference to the recitals in its preamble in which the Partner States recall the causes of the collapse of the former East African Community in 1977 and in which they resolve to act in concert to strengthen their co-operation adhering to fundamental and operational principles set out in the Treaty. In apparent support of this submission learned counsel for the third interveners stressed the fundamental principle in international law of sovereign equality of states, under which any matter over which a state does not expressly relinquish sovereignty, remains within its sovereignty. A state cannot lose sovereignty over any matter by implication of international law.

6. SUBMISSIONS ON ISSUE NUMBER ONE

The claimants' submission on the first framed issue is that the averments in the reference show a cause of action within the meaning of article 30 of the Treaty. They argue that the claimants are competent to make the reference since they are legal and natural persons resident in East Africa. The reference and the supporting documentary evidence, show that the contentious nominations were made pursuant to article 50 of the Treaty as were the election rules under which the nominations were done. The election rules and the process of the nominations and approval of the nominees as members of the Assembly are “regulations, decision and action” of a Partner State whose legality is contestable under article 30. In the reference, the claimants ask the Court to interpret article 50 relative to the said process and rules and to determine if the process and the rules infringe the article. They contend that this is therefore, a justiciable cause of action. They also reiterate that this Court has jurisdiction to determine the reference and to grant the prayers made therein.

On the other hand the first respondent submits that the claimants have not disclosed any cause of action under article 30 of the Treaty. In order to establish a cause of action, a litigant must have *locus standi*. The litigant must have sufficient interest in the subject matter upon which a court is to adjudicate. Secondly, the litigant must be seeking a remedy in respect of a legal right, which has been infringed or violated. According to the first respondent, there are two view points

of the issue of *locus standi* in the instant reference. First, from a strict perspective, since the subject matter of the reference, namely whether the election of Kenya's members of the Assembly was undemocratic and unlawful, is a matter of public interest, the only person that has *locus standi* as the protector of public interest, is the Attorney General of the Republic of Kenya.

Secondly, from a broader perspective, the first, fourth and seventh claimants, being members of the National Assembly, may claim to have *locus standi* on the ground that they have personal interest to ensure that the National Assembly elects strictly in accordance with article 50.

That approach, however, should be avoided as it would make a mockery of democracy to allow them to refer to the Court an issue that they lost to the majority in a democratic debate in the House.

The first respondent also maintains that the claimants failed to show that they have a right conferred by the Treaty, which was contravened. Article 30 does not confer any right on any of the claimants. It is only a procedural provision for enforcing rights conferred under other provisions of the Treaty. If article 30 is interpreted to confer a right on every resident of the Partner State, the Court would be turned into an institution of resolving philosophical discussion and speculation and cease to be a court of law. Since under articles 34 and 52 the Treaty vests interpretation jurisdiction in the national courts also, the substance of the reference should be dealt with by the High Court of Kenya under article 52. If this Court rules on the legality of the contentious election it would be usurping the power of the High Court of Kenya.

In support of the foregoing submissions, learned counsel for the third interveners, also contended that the claimants do not have a cause of action maintainable in this Court, which is an international court. Their grievance raises the question whether the third interveners were elected to the Assembly. The Treaty expressly provides in article 52 that when that question arises, it shall be determined by the relevant institution of the Partner State. The claimants did not seek remedy from the High Court or other institution of the Republic of Kenya. Under the principles of international law, they cannot access this Court before exhausting the local remedy provided by the Treaty itself.

Learned counsel for the third and fourth respondents, stressed that both under the pleadings and in the evidence no claim was made against either of the two respondents. They were not alleged to be persons whose activities gave rise to the reference. They were not shown to have infringed a right conferred on the claimants by the Treaty. No nexus was established linking the third and fourth respondents to the activities complained of in the reference. The claimants did not disclose, let alone prove, any cause of action entitling them to a claim and an award

against the two respondents. Although, in the interlocutory application for injunction they were properly joined, they ought to have been discharged after compliance with the injunction order.

Further, the third and fourth respondents contend that they cannot be party to the reference because they are neither a Partner State nor an institution of the Community whose acts or regulations are referred to the Court under article 30. Finding on issue number one.

From the submissions, we discern the following five grounds upon which the contention of non-disclosure of a cause of action is based, i.e. that:

- (a) The claimants failed to show the essential elements of a cause of action, namely, that their rights or interests were violated or infringed upon;
- (b) Article 30 does not create any right; it creates a forum for adjudication of rights vested by other provisions of the Treaty;
- (c) The substantial question raised in the reference, whether the third interveners are elected members of the Assembly, is not within this Court's jurisdiction;
- (d) The claimants have not exhausted the local remedy provided by the Treaty; and
- (e) In the case of the third and fourth respondents, it is not shown that they are liable for the matters, which are subject of complaint in the reference.

A cause of action is a set of facts or circumstances that in law give rise to a right to sue or to take out an action in court for redress or remedy. In *Auto Garage v Motokov* number 3 [1971] EA 514, a decision of the Court of Appeal for East Africa, Spry VP described a common law cause of action at page 519 D thus:

“if a plaintiff shows that the plaintiff enjoyed a right, that the right has been violated and that the defendant is liable, then, in my opinion, a cause of action has been disclosed and any omission or defect may be amended. If on the other hand, any of those essentials is missing, no cause of action has been shown and no amendment is permissible.”

That description sets out the parameters of actions in tort and suits for breach of statutory duty or breach of contract. However, a cause of action created by statute or other legislation does not necessarily fall within the same parameters. Its parameters are defined by the statute or legislation which creates it.

This reference is not an action seeking remedy for violation of the claimants' common law rights. It is an action brought for enforcement of provisions of the Treaty through a procedure prescribed by the Treaty. The Treaty provides for a number of actions that may be brought to this Court for adjudication. Articles 28, 29 and 30 virtually create special causes of action, which different parties may refer to this Court for adjudication.

Under article 28(1) a Partner State may refer to the Court, the failure to fulfill a Treaty obligation or the infringement of a Treaty provision by another Partner State or by an organ or institution of the Community. Under article 28(2) a Partner State may also make a reference to this Court to determine the legality of any Act, regulation, directive, decision or action on the ground that it is ultra vires or unlawful or an infringement of the Treaty or any rule of law relating to its application or amounts to a misuse or abuse of power. Under article 29 the Secretary General may also, subject to different parameters, refer to the Court failure to fulfill a Treaty obligation, or an infringement of a provision of the Treaty, by a Partner State.

Article 30 provides:

“... It is important to note that none of the provisions in the three articles requires directly or by implication the claimant to show a right or interest that was infringed and/or damage that was suffered as a consequence of the matter complained of in the reference. We are not persuaded that there is any legal basis on which this Court can import or imply such requirement into article 30.”

In the first respondent's written submissions, and in the supplementary oral submissions by the learned Deputy Solicitor General of Kenya a number of authorities were cited in support of the contentions that the claimants had no *locus standi* and/or had 55 not disclosed a cause of action. Unfortunately, no copies were availed to the Court despite undertaking to do so. One that we are able to comment on is the decision of the High Court of Kenya in *Jaramogi Oginga Odinga v Zachariah R Chesoni and Attorney General* miscellaneous application number 602 of 1992 (UR), a copy of which was availed by counsel for the 6th respondent at the hearing of the interlocutory application. In that case, the High Court of Kenya held that section 60 of the Constitution of the Republic of Kenya does not confer any right to a litigant nor create a cause of action. By way of analogy, it is argued that article 30 ought to be interpreted in the same way. We do not need to discuss the decision in any detail. We respectfully agree with that interpretation. But we hasten to point out that the provisions of section 60 of the Constitution of Kenya are not similar or comparable to the provisions of article 30 of the Treaty. The section only vests jurisdiction, albeit unlimited jurisdiction, in the High Court of Kenya. The court held:

“The court's unlimited powers ought to be and are used with judicial restraint and only in situations where ends of justice may be defeated by failing to exercise them. To use these inherent or residual powers, the court must be satisfied on grounds placed before it that the powers should indeed be used. That, in our opinion, is what section 60(1) provides for. It does not create causes of action or courses to follow in those actions.”

In article 30, however, the Treaty confers on any person resident in a Partner State the right to refer the specified matters to this Court for adjudication and as we have just said, by the same provision it creates a cause of action.

Section 60 of the Kenya Constitution, is comparable to provisions of the Treaty that only vest jurisdiction without creating causes of action, like articles 27, 31 and 32, which respectively vest in this Court jurisdiction to interpret the Treaty, to hear and determine disputes between the Community and its employees and to hear and determine arbitration disputes in specified circumstances. We find a more plausible comparison with article 30 of the Treaty to be in article 137 of the Constitution of the Republic of Uganda, which in clause one vests in the Constitutional Court the jurisdiction to interpret the Constitution and in clause three confers on any person the right to petition that court on an allegation that any Act of Parliament or other law, or any act or omission by any person or authority is inconsistent with, or contravenes the Constitution, for a declaration to that effect. The Supreme Court of Uganda has in several decisions held that the article thereby creates a cause of action. (See *Ismail Serugo v Kampala City Council and Attorney General* constitutional appeal number 2 of 1998 (UR)).

Turning back to the claim in this reference, we note that the claimants make no secret of the fact that they were prompted to bring this reference by what they claim to be unlawful substitution of the third interveners for the third, ninth, tenth and eleventh complainants as the NARC nominees and the resultant deeming of the former as elected members of the Assembly. Those circumstances per se raise the question whether the third interveners are elected members of the Assembly and the question is squarely within the parameters of article 52(1), which provides:

“Any question that may arise whether any person is an elected member of the Assembly or whether any seat on the Assembly is vacant shall be determined by the institution of the Partner State that determines questions of the election of members of the National Assembly responsible for the election in question.”

Needless to say, this provision also creates a cause of action under the Treaty. However, it is the one cause of action under the Treaty over which this Court has no jurisdiction. Obviously, that is why the first respondent persistently seeks to strait-jacket this reference into the parameters of article 52(1), to cushion the initial argument that this Court has no jurisdiction over the reference, and additionally to contend that no cause of action triable by this Court is disclosed.

We should mention at this juncture that the same argument is reiterated in submissions on the second framed issue, presumably in an effort to show that it is a nonissue. There, it is argued that the fact of the election is not disputable, and that the substantive dispute arises from the two lists of nominees submitted by NARC's party leader and party whip, respectively. Four of the nominees on the party leader's list who were not elected, claim that they were the rightful nominees who

should have been elected instead of the third interveners who were on the party whip's list. That dispute is not within the ambit of article 30. Basically, it is a dispute on who should have submitted the NARC party nominees, which dispute should have been solved through the internal party mechanism. Outside the party, it is, at most, a dispute as to whether the third interveners were lawfully elected and should have been referred to the High Court of Kenya under article 52.

But, under whatever context, the arguments turn round to one central theme, namely that the Court ought not to determine this reference. In our view, the subtle variation introduced in submissions by learned counsel for the third interveners that the Court had jurisdiction to grant the interim injunction and to hear the reference but has no jurisdiction to grant the remedies prayed for, makes no material difference. We shall dispose of the said theme here and will not return to it under any other framed issue. We agree that if the only subject matter of the reference were those circumstances surrounding the substitution of the third interveners for the said four claimants, this Court would have no jurisdiction over the reference. In paragraphs 29 and 30 of the reference, however, the claimants have referred to the Court two other issues, which we consider to be the core and material pleadings for purposes of the reference. It is those pleadings that disclose the special causes of action, which evoke this Court's jurisdiction under the Treaty. And it is only those pleadings that will be subject of adjudication in this reference.

While it is apparent that the reference of the two issues is an after thought, in our considered opinion it is not tantamount to abuse of court process as submitted by the first respondent.

In the ruling delivered on 27 November 2006, we held that the Court has jurisdiction to hear and determine the reference. We find no reason to review that decision.

Whatever we say on the matter hereafter is to provide the details of our reasons for the decision as we undertook to do in the said ruling.

Under article 33(2), the Treaty obliquely envisages interpretation of Treaty provisions by national courts. However, reading the pertinent provision with article 34 leaves no doubt about the primacy if not supremacy of this Court's jurisdiction over the interpretation of provisions of the Treaty. For clarity, it is useful to reproduce here, the two articles in full. Article 33 provides:

“...”

And article 34 provides:

“...”

The purpose of these provisions is obviously to ensure uniform interpretation and avoid possible conflicting decisions and uncertainty in the interpretation of the same provisions of the Treaty.

Article 33(2) appears to envisage that in the course of determining a case before it, a national court may interpret and apply a Treaty provision. Such envisaged interpretation, however, can only be incidental. The article neither provides for nor envisages a litigant directly referring a question as to the interpretation of a Treaty provision to a national court. Nor is there any other provision directly conferring on the national courts jurisdiction to interpret the Treaty. Article 30 on the other hand, confers on a litigant resident in any Partner State the right of direct access to the Court for determination of the issues set out therein. We therefore, do not agree with the notion that before bringing a reference under article 30, a litigant has to “exhaust the local remedy”.

In our view there is no local remedy to exhaust.

We would express reservations about the supplementary or alternative notion that a litigant who fails to secure relief from the national courts under article 52 would have recourse to this Court to seek the same relief.

Lastly, the third and fourth respondents were not joined for being privy to the actions of the Republic of Kenya or for any wrong they did. They were joined, as learned counsel rightly concedes, because of the relief sought by the claimants, namely the prayer that they be restrained in the terms set out not only in the interlocutory application but also in the reference. The submission would have made more sense if it came prior to the hearing of the reference.

Accordingly, we answer issue number one in the affirmative.

7. SUBMISSIONS ON ISSUE NUMBER TWO

The main thrust of the claimants’ submissions on the second and third issues is that no election, within the meaning of article 50 of the Treaty, was undertaken and that the election rules do not provide for election. The process provided for by the election rules and what actually transpired amount to the antithesis of an election.

The claimants maintain that the expression “shall elect” as used in article 50 can only mean “shall choose by vote”. That is the ordinary meaning as defined in several dictionaries, and as it is understood and practiced not only in all three Partner States, but also in international democratic practice worldwide. Under the Constitution and electoral laws of Kenya that govern the elections of the President, and of the Speaker, Deputy Speaker and Members of Parliament, election means election through voting. The provision in the Treaty that “the National Assembly

“shall elect” therefore, does not import a concept that is unknown to or that differs from that envisaged and practiced by the Republic of Kenya.

The affidavit evidence shows that three parliamentary political parties, namely NARC, KANU and FORD-K, submitted to the House Business Committee names of persons nominated for election as members of the Assembly. On 26 October 2006, the Chairman of the House Business Committee simply tabled in the National Assembly a list of names of nine persons stated to be nominated by the said political parties. That list did not include the names of the third, ninth, tenth and eleventh claimants who had been validly nominated as NARC nominees because at the initiative of Honourable Norman Nyagah, the Government Chief Whip, the House Business Committee had replaced them with the names of the third interveners. As stipulated by the election rules, the nine persons were thereby deemed to be elected by the National Assembly.

Significantly, when introducing the nine names to the House, the Vice-President, who is also Leader of Government Business, said, as his predecessor had said on the equivalent occasion in 2001, that the nine persons were “appointed”. Both leaders knowing the difference between “elected” and “appointed” used the latter word because what had transpired in the House Business Committee was not an election but an appointment of the nine persons. Besides, this was consistent with what the said Government Chief Whip said in his speech recorded on the DVD, bragging immediately prior to the process that only he would name those to be sent to the Assembly. All that goes to show that what transpired was not an election by the National Assembly, but was at best “an appointment” by the Government controlled House Business Committee.

The submissions on this issue, for the first respondent and the supporting interveners, may be summarised as follows. The words “election” and “elect” as used in article 50 do not necessarily connote choosing or selecting by voting. They are not defined in the Treaty. *Black's Law Dictionary* defines “election” as:

“The process of selecting a person to occupy an office (usually a public office).”

Furthermore, though under article 6 of the Treaty the Partner States are committed to adhere to “democratic principles”, no specific notion of democracy is written into the article or the Treaty. Besides, while article 50 provides for the National Assembly of each Partner State to elect nine members of the Assembly, it gives no directions on how the election is to be done, except for the stipulations that the nine must not be elected from members of the National Assembly and that as far as feasible, they should represent specified groupings. Instead, it is expressly left to the National Assembly of each Partner State to determine its procedure for the election. This is in recognition of the fact that each Partner State has its peculiar circumstances to take into account. The essence of the provision in article 50 is that

“the National Assembly of each Partner State shall elect ... nine members of the Assembly ... in accordance with such procedure as [it] may determine.”

Learned counsel for the first interveners, supplements this submission with the argument that the power and discretion of the National Assembly under article 50(1) is so unfettered that the National Assembly may determine a procedure of election that excludes itself from actual or physical voting. In exercise of that power and discretion, the Kenya National Assembly determined its procedure in 2001 by making the election rules, which must be respected.

It is not in dispute that only entitled parliamentary political parties nominated candidates for election and submitted their names to the House Business Committee.

Being satisfied that they were qualified to be elected and that they complied with the terms of article 50, the House Business Committee approved nine of the nominees on 26 October 2006 and on the same day tabled their names before the National Assembly. Thereupon, by virtue of the election rules, the nine nominees were deemed to be elected by the National Assembly. The Speaker confirmed that the process was conducted in accordance with the election rules. The process is a mode of democratic election by proportional representation as practiced not only in Kenya but also in several other democratic countries.

The question that the Court should have been appropriately asked to consider is whether the process conforms to the conditions stipulated in article 50. However, the question did not arise since it was neither alleged, let alone proved, that any of the nine elected persons was not qualified nor that the specified representations, namely representations of various political parties, shades of opinion, gender and other special interest groups were not achieved.

Learned counsel for the second intervener supplemented the submissions in support of an affirmative answer to the second framed issue, with the contention that a proper interpretation of article 50 is not to consider the meaning of the expression “to elect” in isolation but as one with the procedure that article 50 empowers the National Assembly to determine. For the purpose of article 50 therefore, an election means the process determined by the National Assembly as set out in the election rules. If the Court undertakes the task of giving dictionary meaning to the expressions “to elect” and “an election” it will be assuming the role of making rules of procedure, which is the preserve of the National Assembly.

8. FINDING ON ISSUE NUMBER TWO

The first step towards answering the second framed issue is to resolve the conflict of two basic concepts on the import of article 50 that underlie these submissions. One concept is that the article imposes on each National Assembly the function of

electing nine members of the Assembly from the respective Partner States, with a discretionary power to determine the procedure it will follow in executing that function. The other concept is that the article confers on the National Assembly of each Partner State the responsibility, with unfettered discretion, to determine how the nine members of the Assembly from the respective Partner States are to be elected. To find out which of the two concepts reflects the correct object and purpose of article 50 as intended by the parties to the Treaty, we have to consider the provisions of the article in the context of the Treaty as a whole.

However, in view of paragraph 3(b) of article 31 of the Vienna Convention, it is necessary to consider first if Kenya's practice in its application of article 50 since 2001, establishes any agreement of the parties regarding the interpretation of that article. No evidence was adduced on the practice by the other two parties in their application of article 50. However, from the differences between the election rules and the equivalent rules of procedure adopted by the National Assemblies of Tanzania and Uganda, copies of which were availed to Court in the course of oral submissions by counsel, it is evident, and we are able to conclude, that no agreement of the parties regarding interpretation of article 50, can be inferred from the said practice. On the surface, the Tanzania rules provide for elaborate elections by the National Assembly, while the Uganda rules are silent on the issue of election, save that in rule 2 "election" is defined as "a process of approval of names nominated by political parties and presented to the House by the Speaker", and in rules 10 and 11 they provide for the Speaker to announce to the House the "nominations" of members of the Assembly and for the publication in the Gazette of the names of the "elected members" as soon as the Speaker announces them. Clearly, there is glaring lack of uniformity in the application of article 50.

As we said earlier in this judgment, the Treaty creates eight organs of the Community. It prescribes the composition of each organ and how its membership is to be constituted. Memberships of four of the organs, namely, the Summit, the Council, the Coordination Committee and Sectoral Committees are principally constituted by specified ex officio members and additional members determined by the Partner States from time to time. They are all serving officials of the Partner States. The membership of the Court, the judicial organ of the Community, consists of judges appointed by the Summit on recommendations of the Partner States. The Secretariat, the executive organ of the Community is also constituted by appointees. The Secretary General is appointed by the Summit upon nomination by a Head of State. The Deputy Secretaries General are appointed by the Summit on recommendation of the Council. And the Counsel to the Community is appointed on contract.

The Assembly is differently constituted. Its composition is prescribed in article 48. It is the only organ composed of two categories of membership, namely, 27

elected and five ex officio members. In article 50, the Treaty prescribes how the first category of membership is to be constituted, and qualifications of members.

Article 50 is titled:

“Election of Members of the Assembly” and the full text reads:

“...”

Clearly, the overriding object and purpose of article 50 is to prescribe a special mode of constituting the first category of membership of the Assembly. This is done by providing in express, unambiguous and mandatory terms that the section of the Assembly comprising 27 members shall be constituted by members elected severally by the National Assemblies of the Partner States, each of which is entitled to elect nine members. We should observe that this is a notable departure from provisions of articles 56 and 57 of the 1967 Treaty for East African Co-operation, under which each Partner State was mandated to “appoint nine” of the “twenty-seven appointed members” of the Legislative Assembly.

It is also significant that unlike in respect of the other organs, the Treaty does not leave it to each Partner State to appoint or nominate for appointment or otherwise determine the members of the Assembly. In our view, according to the ordinary meaning of the expression “the National Assembly of each Partner State shall elect nine members of the Assembly”, the National Assembly of each Partner State is unconditionally assigned the function of electing nine members of the Assembly. In other words article 50 constitutes the National Assembly of each Partner State into “an electoral college” for electing the Partner State’s nine representatives to the Assembly. We think that there can be no other purpose of naming the National Assembly in this regard other than to constitute it into an electoral college.

The rest of the provisions of article 50 do not add to or subtract from that assignment. They only serve to leave two matters in the National Assembly’s discretion. First, while the article provides that the nine elected members shall as much as feasible be representative of the specified groupings, by implication it appears that the extent of the feasibility of such representation is left to be determined in the discretion of the National Assembly. Secondly, the National Assembly has the discretion to determine the procedure it has to follow in carrying out the election.

In our considered view, the decision to constitute the National Assembly of each Partner State into an electoral college was a deliberate step towards establishing a legislature comprising people’s representatives. The National Assembly, being an institution of people’s representatives, is next to the people themselves, the second best forum for electing such representatives. We are therefore not persuaded by the submission of counsel for the first interveners that

the discretion of determining the procedure of electing the representatives includes an option for the National Assembly to assign the function to any other body. That submission has the effect of extending the discretion beyond what is provided in article 50. It also offends the well established principle articulated in the maxim: “*Delegata potestas non potest delegari*” (a delegated power cannot be delegated).

The next step towards answering the second framed issue is to consider what is meant by the words “election” and “elect” in the setting they are applied in article 50 and in the context of the Treaty as a whole. The first respondent and the supporting interveners capitalise on the absence of any definition of those words in the Treaty and on the fact that the words are capable of bearing meanings other than choosing by vote. However, neither fact leads to any material consequence. The absence of any definition of the words in the Treaty is not ground to contend that the parties to the Treaty attached no meaning to them.

The phenomenon of double or even multiple meanings of words is a common occurrence but does not prevent a court giving the word interpretation in the context it is used. In *International Law and Order* by Professor Georg Schwarzenberger, (Stevens and Sons, London 1971), under the Chapter on Treaty Interpretation, the learned author, commenting on article 31 of the Vienna Convention on the Law of Treaties, which we reproduced earlier in this judgment, says at page 121:

“In accordance with the general rule on interpretation in the Vienna Convention, the object of treaty interpretation is to give their “ordinary” meaning to the terms of the treaty in their context and in the light of its object and purpose.

Unfortunately, almost any word has more than one meaning. The word “meaning” itself has at least sixteen different meanings. Thus if parties are in dispute on any term of a treaty, each one of them is likely to consider the meaning it attaches to a particular word as the ordinary meaning in the context and in the light of the object and purpose of the treaty.”

Fortunately, the words that are under consideration do not bear a multiplicity of meanings. It is common ground that the ordinary meanings of the words “election” and “to elect” are “choice” and “to choose” respectively; and that in the context of article 50 the words relate to the National Assembly choosing or selecting persons to hold political positions. What is in contention is whether the parties to the Treaty intended the choice or selection to be done through a process of voting or through any other process to be determined by each of the three National Assemblies.

The phenomenon of multiple meanings of words makes interpretation of documents a very difficult task; but the task is not insurmountable. Rules of interpretation have been designed to ease the burden, hence the need to invoke them. Indeed, in the instant case, the contention revolves more on the intention of the parties to the Treaty than on the

meaning of the words. Two trite rules of international law, which emanate from the principle of *pacta sunt servanda*, are of particular relevance here. One is that treaty provisions are presumed to have meaning and must not be construed as void for uncertainty, in the way contracts between private persons may be construed at municipal law. The other is that the parties to a treaty cannot be taken to have intended an absurdity. (See *Manual of Public International Law* Edited by Professor Max Sorensen, Uganda Publishing House Limited 1968; paragraph 4.30 and 4.31).

In our view, it would lead to unnecessary uncertainty, if not to absurdity, if article 50 were construed to mean that the parties to the Treaty intended to attach no meaning to the words “election” and “to elect” used in article 50, leaving it to each National Assembly to adopt its preferred meaning of the words through the rules of procedure it determines. Counsel for the first interveners advanced a theory that the matter was intentionally left open-ended because of differences in the level of political development of the Partner States, and in support of the theory relied on the inclusion of the principle of asymmetry among the operational principles of the Community set out in article 7 of the Treaty. With due respect to learned counsel, we find no legal or factual basis for his perception or speculation that at the time of entering into the Treaty the Partner States were at different levels of political development. To our understanding, the operational principle of asymmetry he cited in support of his argument, relates to the acknowledged economic imbalances for whose rectification the parties have, by appropriate protocol, set a formula and time-frame. It is not applicable to any imagined uneven political development of the Partner States.

We think that articles 5 and 6 have a bearing on the subject at hand. By the Treaty, the Partner States established themselves into the Community, for the achievement of elaborate objectives set out in article 5. For purposes of this judgment it suffices to say that the overall objective is developing and strengthening co-operation in specified fields for the mutual benefit of the Partner States; and further establishing among themselves into several stages of integration up to a Political Federation, in order to attain *inter alia* raised standard of living and improved quality of life for their populations. Article 6 outlines five sets of fundamental principles that the parties chose to govern their achievement of the Community objectives. Again for the purpose of this judgment it suffices to highlight only (a) and (d), namely the principles of:

- (a) mutual trust, political will and sovereign equality;
- (b) good governance including adherence to the principles of democracy...

Two other facts are worthy of taking into account. Ordinarily a reference to a democratic election of persons to political office is understood to mean election by voting. Secondly, in all three Partner States, the National Assembly has the function of electing its Speaker and Deputy Speaker. It executes that function by voting in one form or another. The Constitution of the Republic of Kenya provides in sections 37 and 38

that the Speaker and the Deputy Speaker, respectively, shall be elected by the National Assembly.

Those provisions are reiterated in the Standing Orders, which then set out elaborate procedure of conducting the election by ballot. In contrast, Order 154 provides that Members and the Chairman of any select committee shall be “nominated” by the House Business Committee unless nominated by the House on setting up the select committee. Under Order 155, the House Business Committee may “appoint” in place of a member whose membership has ceased or who is absent, another member to act. In the scenarios under Orders 154 and 155, no voting is envisaged.

In view of all the foregoing, we find it very unlikely that in adopting article 50, the parties to the Treaty contemplated, let alone intended, that the National Assembly would elect the members of the Assembly other than through voting procedure. Needless to say, an election through voting may be accomplished using such diverse procedures as secret ballot, show of hands or acclamation. The electoral process may or may not involve such preliminaries as campaigns, primaries and/or nominations. An election may be contested or uncontested. In our considered view, the bottom line for compliance with article 50 is that the decision to elect is a decision of and by the National Assembly.

The evidence before us leads to only one conclusion, namely that the National Assembly of Kenya did not undertake or carry out an election within the meaning of article 50 of the Treaty.

9. SUBMISSIONS ON ISSUE NUMBER THREE

On the third issue specifically, the claimants contend that the election rules do not meet the threshold set by article 50, and to that extent have no bearing on the article.

In formulating the election rules, the Kenya National Assembly disregarded the limits of its discretion under article 50. This is particularly borne out by the evidence from the Hansard reports of the debate in the National Assembly in 2001. The evidence clearly indicates that the rules were adopted notwithstanding that their inconsistency with article 50 was articulated by a number of contributors to the debate. In that connection, during the proceedings of 26 October 2006, in the course of ruling that the National Assembly was bound by the election rules it adopted against his advice in 2001, the Speaker observed that the Kenya National Assembly was living a lie with regard to election of members of the Assembly and urged the House to re-look at his rejected draft rules as it had a right and duty to amend *inter alia* rules that are not in consonance with the expectations of the public.

Learned counsel for the claimants urged that in interpreting the Treaty relative to the election rules, the Court must bear in mind the principle of equivalence, which requires that the Treaty be applied uniformly among the Partner States; and the principle of primacy of Community law in case of conflict with national law.

The first respondent on the other hand submits that the election rules do comply with article 50. Under the Treaty each Partner State has the discretion to choose any democratic electoral system for the election of the members of the Assembly. The election rules made by the Kenya National Assembly establish such a democratic electoral system of proportional representation. They do not infringe article 50 in any way and the Court should respect them.

The first interveners support the submission that the election rules were lawfully made by the Kenya National Assembly within its discretion under, and in compliance with, article 50(1). They submit that in interpreting that article and applying it to the election rules, the Court should take the rules as they are, and not consider whether the rejected drafts were better. The Court cannot question the validity of the rules on basis of whether they are democratic enough. They were made by the competent authority, and were adopted in a democratic manner after a detailed and focused debate. The Court may only determine if in making the rules the National Assembly complied with its mandate to determine a procedure that caters for the stipulations under article 50.

In addition it is contended that the claimants are estopped from challenging the validity of the election rules, which they recognised and relied on up to the conclusion of the election.

10. FINDINGS ON ISSUE NUMBER THREE

We should at the outset reiterate that the point we have to decide on under this issue is whether the election rules constitute an infringement of article 50 of the Treaty. It is therefore, immaterial that the claimants or any of them may have previously regarded the election rules as valid or may have done anything or taken any step in pursuance of their provisions. We say this because it is our firm view that once a question of infringement of the Treaty is properly referred to this Court under article 30, the question ceases to be of purely personal interest. This court would be failing in its duty under article 23 if it refuses to determine the question on the ground of the claimant's previous conduct or belief.

Furthermore, it is well settled that the doctrine of estoppel cannot be raised against the operation of statute. (See *Maritime Electric Company Limited v General Dairies Limited* [1937] 1 All ER 748; *Southend-on-Sea Corporation v Hodgson (Wickford) Limited* [1961] 2 All ER 46 and *T Tarmal Industries v Commissioner of Customs and Excise* [1968] EA 471. Similarly, in our view, estoppel cannot be invoked to prevent an inquiry into an alleged infringement of the Treaty. If the

rules made in exercise of power conferred by article 50 are ultra vires, they cannot be saved on the ground that the claimants previously regarded them as intra vires.

The point of inquiry under this issue is what the rules provide in regard to “election of the members of the Assembly.” Consequently, the 1st respondent misses the point when he submits that through the rules the National Assembly adopted a democratic system of proportional representation. Proportional representation can be effected through nomination and/or appointment as is the case, under article 33 of the Kenya Constitution, for the “nominated members” of the National Assembly. In any case, it is the Treaty that provides for proportional representation in the Assembly, and which directs that the representation shall be achieved by election. The critical point is not whether the rules provide for proportional representation but whether they provide for election of members of the Assembly on basis of proportional representation as provided by article 50.

The election rules provide in rule 4, that the National Assembly shall elect the nine members of the Assembly “according to the proportion of every party in the National Assembly”. To that extent, there is partial compliance with article 50. However, the apparent absence of any provision to cater for gender and other special interest groups is a significant degree of non-compliance, notwithstanding the discretion of the National Assembly in determining the extent and feasibility of the representation. The major deviation from article 50 is that the election rules do not provide for the National Assembly to elect the members of the Assembly. Rule 5 provides for the nomination of candidates by the political parties and sets out the procedure for submitting nomination papers to the House Business Committee. Rules 6 and 7 then provide:

- “(6) The House Business Committee shall consider the nominees of the parties delivered to it under sub-rule (4) of rule 5 and shall ensure that the requirements of article 50 of the Treaty are fulfilled.
- (7) Upon being satisfied that the requirements of rule 6 have been complied with, the House Business Committee shall cause the names of nine nominees of the parties to be tabled before the National Assembly and such nominees shall be deemed to have been elected as members of the East African Legislative Assembly in accordance with article 50 of the Treaty.”

It is not clear if “the requirements of article 50” mentioned in rule 6 and “the requirements of rule 6” mentioned in rule 7 are the same or different, thus making the role of the House Business Committee in the process rather uncertain. What we can deduce from the rules is that its role is to vet the nominees to ensure that they qualify to be elected and presumably that they are representative of the groupings specified in article 50. Be that as it may, it is plain from the two rules that the nine nominees are not elected by the House Business Committee, contrary to a spirited effort by counsel for the third interveners to argue that the House

Business Committee is “an electoral college”. If that were so, it would be unnecessary to stipulate that the nominees are deemed to be elected by the National Assembly. Indeed the use of the expression “nominees are deemed to be elected” signifies that the nominees are not elected.

The same learned counsel persuasively argued that the word “deem” is a good legal word in common usage. He asserted: “We deem that which in law ought to have taken place, to have taken place”. We agree that the word “deemed” is commonly used both in principal and subsidiary legislation to create what is referred to as legal or statutory fiction. The 67 legislatures uses the word for the purpose of assuming the existence of a fact that in reality does not exist. In *St Aubyn (LM) v Attorney General* [1951] 2 All ER 473, Lord Radcliffe describes the various purposes for which the word is used where, at page 498 he says:

“The word “deemed” is used a great deal in modern legislation. Sometimes it is used to impose for the purpose of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible.”

It is common ground that the election rules were made “in exercise of the powers conferred by article 50(1) of the Treaty”, and obviously for the purpose of implementing the provisions of the said article. In rule 7, the legislature used the word “deemed” in order to create the fiction that upon the names of party nominees being laid on the table they would in law be elected by the National Assembly as members of the Assembly although in reality they are not so elected. The reason for creating that fiction is that article 50 of the Treaty expressly provides that the nine members of the Assembly from each Partner State shall be elected by the National Assembly. In other words the fiction was created to circumvent an express provision of the Treaty.

In *Indira Sawhney v Union of India* JT [1999] (9) SC 557: [2000] 1 SCC 168, a statutory declaration of non-existent facts as existing, which was unrelated to existing facts was held to be in violation of articles 14 and 16 of the Indian Constitution. Similarly we hold that rules made for the purpose of implementing provisions of the Treaty cannot be permitted to violate any provision of the Treaty through use of legal fiction. To uphold the legal fiction in rule 7 of the election rules would be tantamount to upholding an amendment of article 50, by one Partner State unilaterally. We can find no justification for doing so.

The dichotomy that this situation poses is as follows: The National Assembly of any democratic sovereign state has the powers of regulating its conduct through rules of procedure by whatever name called. Once made and adopted, they are binding until revoked, amended or otherwise modified by the National Assembly

itself. Ordinarily what the National Assembly does in accordance with such rules is lawful and valid. However, a state, which in exercise of its sovereign power binds itself to an international treaty, may end up facing conflicting demands, namely the demand to abide by its treaty obligations and the demand to abide by its own rules that conflict with the former.

In the reference, the claimants plead, and in the written submissions by counsel it is reiterated, that the election rules were not gazetted or published. However it was not seriously canvassed, let alone proved, that failure to gazette or publish them rendered the rules invalid or of no legal effect. In the written submission the rules are described as “window dressing” with no bearing on article 50, with the additional passing remark: “They have not even been gazetted or published independently”. We make this observation because proof that the rules are of no legal effect would have erased or avoided the dichotomy. As it is, however, we start from the position that the rules are binding on the National Assembly and then consider if their inconsistency with or 68 infringement of article 50 renders them unlawful and not binding on the National Assembly.

As we pointed out earlier in this judgment, the Treaty provides in article 33(2) that decisions of this Court on the interpretation of provisions of the Treaty shall have precedence over decisions of national courts on a similar matter. That provides a clear-cut solution in the event of conflicting court decisions. But the Treaty does not provide a similarly explicit solution to the dichotomy where a Treaty provision (say Community rule) is in conflict with a national rule.

We think the solution lies in the basic principle at international law, to the effect that a state party to a treaty cannot justify failure to perform its treaty obligation by reason of its internal inhibitions. It cannot be lawful for a state that with others voluntarily enters into a treaty by which rights and obligations are vested, not only on the state parties but also on their people, to plead that it is unable to perform its obligation because its laws do not permit it to do so. The principle is embodied in article 27 of the Vienna Convention on the Law of Treaties, which reads:

“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.”

We were referred to several judicial decisions arising from national law that contravened or was inconsistent with European Community law, as persuasive authorities on this subject. (See *Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1; *Flaminio Costa v ENEL* [1964] ECR 585; and *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629). In some cases the national law in issue was in existence when the Community law came into force, while in others it was enacted after the Community law. In either case where there is conflict between

the Community law and the national law the former is given primacy in order that it may be applied uniformly and that it may be effective. For purpose of illustration, it suffices to briefly describe what are commonly called the Factortame cases. Spanish fishermen who owned British registered fishing boats challenged in the British courts new English legislation for being discriminatory in breach of European Community law. They applied for an interim injunction to postpone the operation of the new legislation pending a preliminary ruling on a reference made to the European Court of Justice (ECJ) to determine if the law was contrary to Community law.

The House of Lords dismissed the application on the ground that under the English law the courts cannot issue an injunction against the Crown. That decision was also referred to the ECJ which held that the full effectiveness of Community law would be impaired if a rule of national law could prevent a court seized of a dispute governed by Community law from granting an interim relief. On basis of the preliminary ruling by the ECJ, the House of Lords in *R v Secretary of State for Transport ex parte Factortame Limited* number 2 [1991] 1 AC 603, reconsidered and reversed its previous decision.

In the instant reference, the position of the first respondent and the supporting interveners appears to be on weaker ground. First, while we appreciate that the election rules were subject of a full debate touching on the provisions of article 50, and that the rules were adopted through a democratic decision, the decision was made irrespective of the awareness of the possibility that the rules were an infringement on article 50. Secondly it is noteworthy, that the National Assembly made the rules not in exercise of sovereignty inherent in a state, but in exercise of a discretionary power conferred on it by the Treaty. It was bound to make rules that conform to the primary purpose of the article that conferred the power, which primary purpose is to provide for the election of nine members of the Assembly by the National Assembly of each Partner State. That purpose is defeated by the provision of rule 7 of the election rules, which provides for a fictitious election in lieu of a real election.

We therefore find that the election rules infringe article 50 to the extent of their inconsistency with it, which we have identified.

In the result we declare that the National Assembly of Kenya did not undertake an election within the meaning of article 50 of the Treaty, and that the election rules in issue infringe the same article.

We order that the claimants shall have costs of the reference to be borne by the first respondent and to be taxed by the Registrar taking into account that a single applicant could have presented the reference. All other parties shall bear their own costs.

Before taking leave of this reference we are constrained to observe that the lack of uniformity in the application of any article of the Treaty is a matter for concern as it is bound to weaken the effectiveness of the Community law and in turn undermine the achievement of the objectives of the Community. Under article 126 of the Treaty the Partner States commit themselves to take necessary steps to *inter alia* “harmonise all their national laws appertaining to the Community”. In our considered opinion this reference has demonstrated amply the urgent need for such harmonization.

Secondly, we also are constrained to say that when the Partner States entered into the Treaty, they embarked on the proverbial journey of a thousand miles which of necessity starts with one step. To reach the desired destination they have to ensure that every subsequent step is directed forward towards that destination and not backwards or away from the destination. There are bound to be hurdles on the way. One such hurdle is balancing individual state sovereignty with integration. While the Treaty upholds the principle of sovereign equality, it must be acknowledged that by the very nature of the objectives they set out to achieve, each Partner State is expected to cede some amount of sovereignty to the Community and its organs albeit in limited areas to enable them play their role.

For the appellant:

Information not available

For the respondent:

Information not available

THE REPUBLIC OF KENYA AND COMMISSIONER OF LANDS V COASTAL ACQUACULTURE

COMESA COURT REFERENCE NUMBER 3 OF 2001 INTERLOCUTORY APPLICATION TO STRIKE OUT REFERENCE FOR WANT OF *LOCUS STANDI*

[1] *COMESA Court – Jurisdiction – Exhaustion of local remedies compulsory prerequisite to filing an application before the court.*

Editor's Summary

On the 19 July 2001, the respondent filed in the COMESA Court under Rule 30 of the COMESA Court Rules, an application seeking an injunction. In summary, the respondent prayed this Court to restrain the first applicant, its servants, agents or officers from acquiring certain parcels of land without first complying with certain legal requirements as to compulsory acquisition of land:

The respondent claimed in his application the following orders: An Order directed at the Registrar of Titles, Kenya to rectify the Register of Titles by cancelling, correcting, or substituting the entries relating to the properties set out in paragraph (j) above to give effect to the judgment of this Honourable Court; An Order directing the Registrar-General of Kenya to cancel all other entries and instruments in the Register pertaining to land falling within the respondent's land known as Ngomeni Peninsula; An Order directing the Registrar-General of Kenya to issue entries in the Register as may be necessary to give effect to the Judgment or order of this Honourable Court.

The applicant filed a Preliminary Application under Rules 82 and 83 of the Rules of the Court, raising firstly, the issue of a lack of jurisdiction in this Court to entertain this Reference; and secondly, the *locus standi* of the respondent in invoking the jurisdiction of this Court.

Held – Article 23 of the COMESA treaty which provides for the general jurisdiction of the Court, stipulates that the Court shall have jurisdiction to adjudicate upon all matters which may be referred to it pursuant to this Treaty. This provision relates to those persons upon whom the Treaty confers a legal right to refer matters upon which the Court has jurisdiction for adjudication by the Court. Thus, unless a party is imbued with a legal right to refer matters to this Court for adjudication in terms of the Treaty, he has no *locus standi* to file a Reference in this Court.

A party may refer a matter to the Court, and the Court can exercise jurisdiction over such reference, only if the respondent has exhausted all its remedies in the municipal courts of the particular Member State.

The matter of the compulsory acquisition of respondent's parcels of land is still pending in the Republic of Kenya and the respondent is precluded by the proviso to article 26 from commencing a reference in this Court

Cases referred to in judgment

(“A” means adopted; “AL” means allowed; “AP” means applied; “APP” means approved; “C” means considered; “D” means distinguished; “DA” means disapproved; “DT” means doubted; “E” means explained; “F” means followed; “O” means overruled)

East Africa

Coastal Aquaculture Limited v Commissioner of Lands and Attorney-General High Court of Kenya at Nairobi civil suit number 2421 of 1996 (UR)

Commissioner of Lands v Coastal Aquaculture Limited civil appeal number 252 of 1996 (UR)

Judgment

KORSAH, KALAILE, SAKALA, OGOOLA AND MUTSINZI LJJ: On the 19 July 2001, the respondent filed in the Registry of this Court under Rule 30 of the COMESA Court Rules, an application seeking an injunction. In summary, the respondent prayed this Court to restrain the first applicant, its servants, agents or officers from acquiring Land Reference numbers 17600 and 17601/2 Tana River, Kilifi District:

(a) without first ...

The respondent prayed for other remedies which, from the view we take of this application, it is not necessary to set down.

On 21 August 2001 the applicant herein filed a Preliminary Application under Rules 82 and 83 of the Rules of this Court, raising firstly, the issue of a lack of jurisdiction in this Court to entertain this Reference; and secondly, the *locus standi* of the respondent in invoking the jurisdiction of this Court.

1. FACTS

That the respondent is a limited liability company incorporated under the Laws of the Republic of Kenya is not in dispute. Nor is it denied that the respondent is the registered proprietor of the two pieces of land known as Plot numbers 17600 and

17601/2 both in Tana River District of Kenya. It is common cause that by Legal Notices 5689 and 5690 both dated 4 November 1993, the Commissioner of Lands of the Republic of Kenya evinced an intention to compulsorily acquire the said plots of land, and to hold an enquiry in respect of compensation to be paid therefor.

The power for the compulsory acquisition of land in Kenya is conferred by section 75 of the Constitution of Kenya which reads:

- “75(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied:
- (a) the taking of possession or acquisition is necessary in the interest of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to promote the public benefit; and
 - (b) the necessity therefor is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and
 - (c) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.
- (2) Every person having an interest or right in or over property which is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired shall have a right of direct access to the High Court for:
- (a) the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled; and
 - (b) the purpose of obtaining prompt payment of that compensation:

Provided that if Parliament so provides in relation to a matter referred to in paragraph (a) the right of access shall be by way of appeal (exercisable as of right at the instance of the person having the right or interest in the property) from a tribunal or authority, other than the High Court, having jurisdiction under any law to determine that matter.”

And the procedure regulating such acquisition is to be found in Part II of the Land Acquisition Act [Chapter 295] up to and including section 6, which provides as follows:

Acquisition of Land.

- 6(1) Where the Minister is satisfied that any land is required for the purpose of a public body, and that:

- (a) the acquisition of the land is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of any property in such manner as to promote the public benefit; and
 - (b) the necessity therefor is such as to afford reasonable justification for the causing of any hardship that may result to any person interested in the land, and so certifies in writing to the Commissioner, he may in writing direct the Commissioner to acquire the land compulsorily under this part.
- (2) On receiving a direction under subsection (1), the Commissioner shall cause a notice that the Government intends to acquire the land to be published in the Gazette, and shall serve a copy of the notice on every person who appears to him to be interested in the land.”

As rightly stated by Ringera J in his judgment in miscellaneous civil application number 55 of 1994 between the same parties herein:

“According to the law, as laid down in the Constitution as read together with the Act, Compulsory acquisition of land is an exceptional measure to be taken only where the Minister is satisfied that the land is required by a Public body (not individuals) for any of the purposes specified in the Constitution and that the necessity of the acquisition justifies the hardship caused to the owner. The Minister should then so certify to the Commissioner of Lands and direct him to compulsorily acquire the land.

The other constitutional safeguard is the owner’s right of direct access to the High Court not only to challenge the legality of the acquisition but also to question quantum of compensation payable to him and to press for prompt payment thereof.”

In that matter Ringera J held that Tana River Delta Wetlands for whom the respondents plots were being compulsorily acquired was neither a public body nor a purpose specified in section 6(1) of the Act. In the judgment which received the full approval of the Court of Appeal, the learned Judge delivered himself thus:

“As regards the adequacy and validity of the notice published under section 6(2) I have come to the judgment that that notice should reflect the Minister’s certification to the Commissioner under section 6(1), and must accordingly include the identity of the public body for whom the land is acquired and the public interest in respect of which it is acquired. It is only when a notice contains such information that a person affected thereby can fairly be expected to seize his right to challenge the legality of the acquisition. That is because the test of the legality of the acquisition is whether the land is required for a public body for a public benefit and such purpose is so necessary that it justifies the hardship to the owner. Those details must be contained in the notice itself for the *prima facie* validity of the acquisition must be judged on the content of the notice. The test must be satisfied at the outset and not with the aid of subsequent evidence. I do not understand *Re Kisima* (*supra*) to hold that information subsequently gleaned from material before the court can cure the defects apparent on the face of the notice. I understand the case to hold that failure to specify the public body for whom the land is acquired and the purpose of the acquisition are the defects which persuaded the court

that the applicant therein had established a *prima facie* case that the Commissioner of Lands lacked jurisdiction to proceed with compulsory acquisition. The learned Judge also made the additional observation that if the affidavit evidence before him was to be accepted the persons for whose benefit the land was intended to be acquired were not a public body. In the result, I find and hold that Gazette Notice number 5689 of 4 November 1993 is defective and invalid for the reason that it did not identify the public body for whom the land was being acquired and the public purpose to be served by such acquisition. The words “Tana River Delta Wetlands” cannot but be a geographical-cum-ecological description. They are not the name of any public body or descriptive of the public purpose of the acquisition. They are accordingly incompetent to satisfy the requirements of the law. That being the position, it follows that Gazette Notice number 5690 of 4 November 1993 notifying interested parties of the holding of an inquiry into claims for compensation was also invalid. As the jurisdiction of the Commissioner of Lands to hold the inquiry was conditional on publication of valid notices of the acquisition and of the inquiry, I must, and do conclude, that the Commissioner lacked jurisdiction to commence or continue the inquiry under section 9(3) of the Land Acquisition Act. I am accordingly inclined to order that prohibition do issue as prayed.”

He granted the Order of Prohibition and Mandamus against the Commissioner of Lands’ operations under the defective notices, and not against the Minister’s certificate in writing to the Commissioner, that the land be compulsorily acquired.

The respondent’s claim is that on 16 June, 2000 the Commissioner of Lands published Gazette Notice numbers 3624 and 3625 indicating the Government’s intention to acquire the respondent’s same land and the Commissioner’s intention to hold an inquiry on 22 August 2000 for the determination of claims for compensation. These Gazette Notices numbers 3624 and 3625, were drawn in identical terms as the previous Gazette Notices of 1993 which Ringera J declared defective, null and void, and which decision the Court of Appeal upheld in *Commissioner of Lands v Coastal Aquaculture Limited* civil appeal number 252 of 1996 (UR).

The respondent further deposed that by way of a Letter of Allotment Reference number 125124/4 (this should probably read 125154/4) in June 1992, it acquired a legal interest in 2674 hectares of land in Kilifi District, commonly known as Ngomeni Peninsula, and that its legal rights in such land have been infringed and frustrated by the Second applicant issuing title deeds to various companies and individuals within the respondent’s said allotment. In consequence whereof the respondent has suffered special damages as particularized in Annexures 5, 6, 7 and 10 to this Reference.

It cannot be gainsaid that this Court owes its origin to the Treaty establishing the Common Market for Eastern and Southern Africa, see article 7 of the COMESA Treaty. Paragraph 4 of article 7 of the Treaty recites that:

“The organs of the Common Market shall perform their functions and act within the limits of the powers conferred upon them by or under this Treaty.”

As an organ of the Treaty this Court has no power outside what is bestowed upon it by the Treaty. Article 19 of the Treaty enjoins this Court to “ensure the adherence to law in the interpretation and application of this Treaty.” Since parties to the Treaty cannot agree to bind strangers to the provisions of the Treaty, the only bodies to whom the Treaty applies are the Member States, organs and institutions of COMESA, their employees and such third parties as the Treaty accords the right to bring legal action against the Common Market or its institutions.

Article 23 which provides for the general jurisdiction of the Court, stipulates that the Court shall have jurisdiction to adjudicate upon all matters which may be referred to it pursuant to this Treaty. This provision relates to those persons upon whom the Treaty confers a legal right to refer matters upon which the Court has jurisdiction for adjudication by the Court. Thus, unless a party is imbued with a legal right to refer matters to this Court for adjudication in terms of the Treaty, he has no *locus standi* to file a Reference in this Court.

References by legal and natural persons are permitted under the Treaty by article 26, which stipulates that:

“Any person who is resident in a Member State may refer for determination by the Court the legality of any act, regulation, directive, or decision of the Council or Member State on the grounds that such act, directive, decision or regulation is unlawful or an infringement of the provisions of this Treaty.

Provided that where the matter for determination relates to any act, regulation, directive or decision by a Member State, such person shall not refer the matter for determination under this article unless he has first exhausted local remedies in the national courts or tribunals of the Member State.”

Thus, the respondent being a legal person resident in a Member State may have the requisite *locus standi* to refer proceedings to this Court for determination only if it has exhausted all local remedies in the national courts or tribunals of Kenya.

It is not controverted that the respondent filed *Coastal Aquaculture Limited v Commissioner of Lands and Attorney-General* High Court of Kenya at Nairobi civil suit number 2421 of 1996 (UR), seeking damages purportedly suffered as a result of the prohibited attempts by the applicant to compulsorily acquire the said parcels of land.

The respondent however did not prosecute that action to finality in the High Court of Kenya. The respondent withdrew that action just before commencing these proceedings in this Court.

In justification of proceeding thus, the respondent contends that it finds itself in an unbearable situation for which the national courts are powerless to provide relief. The respondent argues that it has invested in excess of US\$24 million for pre-operational expenses alone, and that it has, since 1993, been unable to continue with its intended projects: firstly, because the applicant has frustrated the respondent's efforts as a result of three separate compulsory acquisition attempts, none of which has been settled in a satisfactory manner in consequence of which no compensation has been paid. Despite the ever present threat and clear expression that the respondent's property will be compulsorily acquired, the applicants, as incredible as it may sound, have, over a period of 8 years or more, been unable to follow the simple legal procedures laid down in the Land Acquisition Act (*supra*) to their logical conclusion, despite repeated guidance from the High Court and the Court of Appeal of Kenya. Secondly, and as a direct result of the first, no investor, private, local or international, will invest further in the respondent's project or any project when there is clearly in place an unfair and inequitable treatment of private investors.

Much as this Court may sympathize with the respondent regarding the frustration of his projects on the said parcels of land by the applicants, and the resultant shyness of investor funding for the projects, the respondent may refer a matter to this Court, and this Court can exercise jurisdiction over such reference, only if the respondent has exhausted all its remedies in the municipal courts of the particular Member State.

As pointed out earlier, all the respondent would have been entitled to if the procedures under the Act were followed would have been compensation. The withdrawal by the respondent of its action for damages in civil suit number 2421 of 1996 (*supra*) does not constitute an exhaustion of the respondent's legal remedies in the municipal courts of the Republic of Kenya such as to grant the respondent a *locus standi* to commence this Reference.

Finally, we are wholly in agreement with the view expressed by Ringera J and upheld by the Court of Appeal of Kenya that once the responsible Minister certifies that the land is required for the purpose of the Land Acquisition Act:

"The acquisition...can only be withdrawn as a matter of Ministerial discretion where the Minister is satisfied for any reason that it is no longer necessary or expedient to proceed with the acquisition. A Court of Law cannot direct the Minister to withdraw the acquisition save perhaps in proceedings where the legality of the acquisition is successfully challenged."

In the circumstances, the matter of the compulsory acquisition of respondent's parcels of land is still pending in the Republic of Kenya and the respondent is precluded by the proviso to article 26 from commencing a reference in this Court.

The application to strike out the respondent's Reference for want of *locus standi* is allowed. Accordingly, the respondent's Reference to this Court is dismissed.

In the circumstances of this case, we make no order as to costs.

It is so ordered.

For the appellant:

Information not available

For the respondent:

Information not available

EASTERN AND SOUTHERN AFRICAN TRADE AND OTHERS V MARTIN OGANG

IN THE COMESA COURT OF JUSTICE LUSAKA, ZAMBIA

REFERENCE NUMBER 1B OF 2000

[1] COMESA court – Locus standi – Jurisdiction of the court – Who has locus standi to invoke the court's jurisdiction.

Editor's Summary

On 20 January 2000, the respondent filed in the COMESA Court, under Rule 75 of the Rules of Court of the Court of Justice of the Common Market for Eastern and Southern Africa (hereinafter referred to as the "Rules"), an application for a Suspension Order. By that application, the respondent prayed the Court for an order suspending the operation of Resolution number 58/99/01 dated 6 December 1999, passed by the Board of Directors of the first applicant herein ("PTA Bank") at its 58th meeting, pending the hearing and final determination of Reference number 1B/2000, filed contemporaneously with the respondent's application for a Suspension Order.

The PTA Bank raised two preliminary objections to Reference numbers 1A/2000, 1B/2000 and 1C/2000 filed by the respondent.

Firstly, it is contended by the PTA Bank that the failure by the respondent to state the law or statute "upon which it's standing before this Court is established" deprives him of a *locus standi*, and disentitles him from any of the remedies he seeks. Secondly, it is contended that the Comesa Court of Justice lacks jurisdiction to entertain the said References or try the issues therein raised as the respondent has not pleaded the law or statute upon which the Court's jurisdiction is founded. The Court dealt with the jurisdictional issue first. The application was vehemently opposed by the respondent.

Held – It is a well-known principle of law that an international organization cannot confer on itself, privileges and immunities to be granted to it by its member states. The organization may set out the privileges and immunities that it considers necessary, which can only be given the force of law in the territories of its member states by the member states themselves

Article 42 of the Charter of the PTA Bank is only intended to describe the type of privileges and immunities that are to be conferred upon the PTA Bank and article 43 then goes on to provide that these privileges and immunities shall be

conferred not by the Bank upon itself, but by those who can do so, namely, the member states.

The jurisdiction of the COMESA Court of Justice derives not from the Rules of the Court of Justice, but from the Treaty establishing the Common Market for Eastern and Southern Africa itself.

Being an institution of the COMESA Treaty, the PTA Bank is not exempt from the jurisdiction of the COMESA Court. Its Charter is subservient to the Treaty, which endowed this Court with jurisdiction over all organs and institutions of the Common Market inclusive of their employees.

Decisions of the COMESA Court shall have precedence over decisions of national courts in the interpretation of the provisions of the COMESA Treaty.

COMESA, not unlike a national government is comprised of several organs and institutions. As in government, public office means employment in the Civil Service or in any other public sector capacity. Similarly those who work at the institutions of the Common Market, whether employed at the Secretariat or by an organ or institution of the Common Market, are also employees of the Common Market. They are international public officers in the COMESA Civil Service. The acts and decisions of all these organs and institutions, although they may be autonomous, are subject to challenge in this Court, which according to article 19 of the COMESA Treaty, is to ensure the adherence to law in the interpretation and application of the Treaty.

As to the *locus standi* of the respondent, there are no Rules of the Court of Justice of the Common Market for Eastern and Southern Africa that have been breached, so as to deny him *locus standi* in this matter. He alleged the Bank breached the rules of natural justice and he thereby suffered damage. Whether he can prove what he alleges is another matter altogether.

Case referred to in judgment

("A" means adopted; "AL" means allowed; "AP" means applied; "APP" means approved; "C" means considered; "D" means distinguished; "DA" means disapproved; "DT" means doubted; "E" means explained; "F" means followed; "O" means overruled)

United Kingdom

Customs and Excise Commissioners v APS Samex Hanil Synthetic Fibre Industry Company Limited third party [1983] 1 All ER 1042

United States

Broadbent v Organization of American States 202 US App DC 27

Judgment

KORSAH, NYANKIYE, KALAILE, SAKALA AND OGOOLA LJJ: Lord Justice Korsah delivered the Judgment of the Court.

On 26 March 2001, we pronounced our decision and orders in this Application and reserved our reasons. Those reasons now follow: On 20 January 2000, the respondent filed in the Registry of this Court, under Rule 75 of the Rules of Court of the Court of Justice of the Common Market for Eastern and Southern Africa (hereinafter referred to as the “Rules”), an application for a Suspension Order (Reference number 1A/2000). By that application, the respondent prayed this Court for an order suspending the operation of Resolution number 58/99/01 dated 6 December 1999, passed by the Board of Directors of the first applicant herein at its 58th meeting, pending the hearing and final determination of Reference number 1B/2000, filed contemporaneously with the respondent’s application for a Suspension Order. For the sake of convenience and clarity we shall refer to both applicants as the “PTA Bank” and to the respondent as “Martin Ogang”.

In the instant application, the PTA Bank raised two preliminary objections to Reference numbers 1A/2000, 1B/2000 and 1C/2000 filed by Martin Ogang.

Firstly, it is contended by the PTA Bank that the failure by Martin Ogang to state the law or statute “upon which its standing before this Court is established” deprives him of a *locus standi*, and disentitles him from any of the remedies he seeks. Secondly, it is contended that the Comesa Court of Justice lacks jurisdiction to entertain the said References or try the issues therein raised as Martin Ogang has not pleaded the law or statute upon which the Court’s jurisdiction is founded. We intend to deal with the jurisdictional issue first as the resolution of it may tend to unravel the question of Martin Ogang’s *locus standi* in this matter. The application was vehemently opposed by Martin Ogang.

The PTA Bank’s argument is that, by its Charter, which was concluded on 12 July 1985, but the date of promulgation is unknown, it was accorded certain privileges and immunities in territories of PTA Member States, from legal proceedings. Article 42 upon which great reliance is placed in support of this contention, as quoted by Martin Ogang at page 38 of Reference number 1B/2000 provides as follows:

- “(1) Actions may be brought against the Bank in the territories of the Member States or elsewhere in a Court of competent jurisdiction.
- (2) No action shall be brought against the Bank by Members of the Bank or persons acting for or deriving claims from them. However, Members of the Bank shall have recourse to such special procedures for the settlement of disputes between the Bank and its Members as may be prescribed in this Charter or in the regulations of

the Bank made in accordance with the terms of contracts entered into with the Bank.”

Paragraph 2 applied to Members of the Bank who were all States, or financial institutions, as no individual was a member of the Bank.

As cited by the PTA Bank, at page 4 in Reference number 1D/2000, article 42 in relevant part, stipulates that:

- “(1) Subject to paragraphs 3 and 4 below, the Bank shall enjoy immunity from every form of legal process except in cases arising out of its borrowing powers when it may be sued only in a court of competent jurisdiction in the territory of the member State in which the Bank has its principal office, or in the territory of a Member State or non-Member State where it has appointed an agent for the purpose of accepting service or notice of process or has issued or guaranteed securities.
- (2) No action shall be brought against the Bank by Members of the Bank or persons acting for or deriving claims from them. However, Members of the Bank shall have recourse to such special procedures for the settlement of disputes between the Bank and its Members as may be prescribed in this Charter or in the regulations of the Bank made in accordance with the terms of contracts entered into with the Bank.”

For the purposes of this Judgement we accept that the original Charter may have been amended to create the scenario, which the PTA Bank presents – one favourable to the PTA Bank, but not so favourable to Martin Ogang. There are, however, serious obstacles to overcome before the validity of this amendment can be accepted.

Counsel for the PTA Bank contended that the PTA Bank was not an organ of COMESA and as such was not answerable to the laws and Regulations of the Common Market, because it has a Charter of its own which regulates its activities and relationship with its employees. This fallacious assertion does not take cognisance of the following facts:

The PTA Bank was established under article 2 of its Charter pursuant to Chapter 9 of the Treaty for the establishment of the Preferential Trade Area for Eastern and Southern African States, which came into force on 2 September 1982 (see Legal Counsel’s Note at page 49 of the Charter). The first Charter of the PTA Bank was concluded at Bujumbura, Republic of Burundi, on 12 July 1985. Article 174 of the Treaty establishing COMESA, in paragraph 2 thereof, names the PTA Bank as one of its institutions continuing in force.

In the original Charter of the PTA Bank, which was exhibited in Reference number 1B/2000 by Martin Ogang, article 42 paragraph 1 stipulates, as above

indicated, “That actions may be brought against the Bank in the territories of the Member States or elsewhere in a court of competent jurisdiction.

Amendments to the said Charter were subsequently made by the Board of Governors. The first of such amendments being made in 1990.

Counsel further contended that by an amendment to its Charter in respect of article 42, the PTA Bank now enjoys immunity from every form of legal process. Inviting, as that argument may seem, we are not persuaded by it.

In the first place, the fountain and origin of the powers, privileges and immunities of all organs and institutions of COMESA is the Treaty itself.

By paragraphs 4 and 5 of article 174, the privileges and immunities of the PTA Bank were fossilised as at December 1984. At that date its privileges and immunities were restricted to process in the Courts of Member States only, and could not extend to this Court. In the second place, the Treaty does not provide for the existence of a rogue organ or institution flouting with impunity, all the rules of the organisation from which it derives birth.

Thirdly, any privileges and immunities that the PTA Bank, by an amendment of its Charter, assumed after 1984 are *ultra vires* the Treaty that breathed life into the Bank. How can subsidiary legislation have preeminence over the parent constitution when it is in conflict with that constitution? If indeed, the PTA Bank’s Charter was amended by the Board of Governors in respect of article 42 paragraph 1, to confer upon the Bank “immunity from every form of legal process” then that amendment was *ultra vires* article 174 of the Treaty, which has not been amended.

It is a well-known principle of law that an international organization cannot confer on itself, privileges and immunities to be granted to it by its member states. The organization may set out the privileges and immunities that it considers necessary, which can only be given the force of law in the territories of its member states by the member states themselves. Article 42 of the Charter of the PTA Bank is only intended to describe the type of privileges and immunities that are to be conferred upon the PTA Bank and article 43 then goes on to provide that these privileges and immunities shall be conferred not by the Bank upon itself, but by those who can do so, namely, the member states. In Kenya, for instance, it is the Privileges and Immunities (Eastern and Southern African Trade Development Bank) Order, 1991, that conferred privileges and immunities on the PTA Bank and certainly not article 42 of the Charter of the PTA Bank or any amendments made to it by the Board of Governors of the PTA Bank. That the Board of Governors of the PTA Bank has itself, the right to confer privileges and immunities on the Bank, which has the force of law in the Member States, is, therefore, a fallacy. The amended article of the Charter of the PTA Bank purporting to confer privileges and immunities upon itself, confers no privileges and immunities that have the force of law within COMESA. They can only be given the

force of law in the COMESA Member States if the Member States themselves provide for it in their national laws.

Lastly, paragraph 6 of article 174 of the Treaty, for the avoidance of doubt, declares that:

- “(6) Any references in the agreements referred to in paragraph 5 of this article to the Preferential Trade Area or any officer or authority thereof shall have the effect as if references therein were substituted by the Common Market and the corresponding officer or authority thereof.”

This emphasises the continuance of the PTA Bank as an Institution of COMESA though autonomous. But the PTA Bank does not exist in the air.

It is composed of its Governors, officers and employees.

Article 43 paragraphs 3 and 4 of the Bank’s Charter recite that:

- “(3) The Bank, its property and assets shall enjoy immunity from all legal process except in so far as in any particular case it has, through the President, expressly waived its immunity: provided however that no waiver of immunity shall extend to any measure of execution.
- (4) The principal as well as regional offices of the Bank shall be inviolable. The property and assets of the Bank shall be immune from search, requisition, expropriation, and any other form of interference, whether by legislative, executive, judicial or administrative action.”

It bodes well to remember that when these privileges and immunities were conferred on the PTA Bank, the only courts in existence were the national Courts of the Member States comprising COMESA and the Tribunal established under article 10 of the PTA Treaty of 1982. Although a Court of Justice had been decreed to be one of the principal organs of the Common Market (article 7 of the Treaty Establishing COMESA) it was still nascent.

The jurisdiction of the COMESA Court of Justice derives not from the Rules of the Court of Justice, as the PTA Bank erroneously assumes, but from the Treaty establishing the Common Market for Eastern and Southern Africa itself.

Article 7 paragraph 1 reads:

...

And paragraph 4 of article 7 of the Treaty, which recites that:

...

To put the issue beyond doubt article 27 of the Treaty entitled:

“Jurisdiction Over Claims by Common Market Employees and Third Parties Against Common Market or its Institutions”, encapsulates the intendment of the framers of the Treaty, by providing that:

...

It is not susceptible of doubt that the PTA Bank is an institution of the Common Market as illustrated above. Being an institution of the COMESA Treaty, the PTA Bank is not exempt from the jurisdiction of the COMESA Court. Its Charter is subservient to the Treaty, which endowed this Court with jurisdiction over all organs and institutions of the Common Market inclusive of their employees.

Far from articles 29 and 30 of the Treaty, which confer limited jurisdiction on national courts in disputes to which the Common Market is a party, being derogations from the powers of this Court, they underscore the fact that decisions of this Court shall have precedence over decisions of national courts in the interpretation of the provisions of this Treaty. For an illustration of the application of such articles see *Customs and Excise Commissioners v APS Samex (Hanil Synthetic Fibre Industry Company Limited third party)* [1983] 1 All ER 1042.

The reasons for granting immunity from judicial process in national courts of Member States of international organisations were succinctly stated in *Broadbent v Organization of American States* 202 US App DC 27, 628F 2d 27 (DC Cir 1980) at 34–35 thus:

“The United States has accepted without qualification the principles that international organisations must be free to perform their functions and that no member state may take action to hinder the organisation. The unique nature of the international civil service is relevant.

International officials should be as free as possible, within the mandate granted by the member states, to perform their duties free from the peculiarities of national politics... An attempt by the court of one nation to adjudicate the personnel claims of international civil servants would entangle those courts in the internal administration of those organisations. Denial of immunity opens the door to divided decisions of the courts of different member states passing judgment on the rules, regulations, and decisions of international bodies. Undercutting uniformity in the application of staff rules or regulations would undermine the ability of the organization to function effectively.”

It is precisely to obviate injustice to an international civil servant in such circumstances or happenstance that most large international organizations have established administrative tribunals with exclusive authority to deal with employee grievances. The World Bank has established an administrative tribunal to resolve employees’ claims based on employment contract disputes. Article 179 of the EEC Treaty and article 152 of the Eurotom Treaty provide that the Court of Justice is to have jurisdiction in any dispute between the Community and its servants within the limits and under the conditions laid down in the Staff Regulations or the

Conditions of Employment. (See *Halsbury's Laws of England* (4 ed) paragraph 2.97 for "persons covered"). In similar vein, article 27 of the Treaty of the Common Market (*supra*) confers jurisdiction on this Court to "hear disputes between the Common Market and its employees that arise out of the Staff Rules and Regulations of the Secretariat or the terms and conditions of employment of the employees of the Common Market".

At first blush, it appears as if the provisions of paragraphs 4 and 5 of article 174 which provide in relevant part as follows:

- "(4) The rights and obligations arising from certain agreements concluded under the provisions of the PTA Treaty shall not be affected by the provisions of this Treaty.
- (5) For the purposes of paragraph 4 of this article, the agreements referred to in that paragraph are:
 - (a) the Agreement on Privileges and Immunities adopted by the PTA Member States in December, 1984;"

Deprive this Court of jurisdiction to entertain judicial proceedings in cases in which the PTA Bank is a party. But a careful perusal of article 43 of the Bank's Charter discloses that the Bank's immunity from legal process is limited to national courts of Member States.

Paragraph 1 of article 43 of the PTA Bank's Charter, reads:

...

Paragraphs 3 and 4 of the article upon which the PTA Bank relies for immunity from process are, therefore, restricted in operation to the jurisdiction of national courts of Member States and have no application to the jurisdiction conferred on the international Court of COMESA by articles 19, 23, 24, 25, 26, 27, 29, 30 and 32 of the Treaty Establishing the Common Market for Eastern and Southern Africa. Article 27 of the Treaty is entitled:

"Jurisdiction over Claims by Common Market Employees and Third parties Against the Common Market or its institutions."

We are satisfied that the title of this article is indicative of the intention of the framers of the Treaty to provide a forum to both employees of the Organs of the Common Market including the Secretariat and employees of the Institutions of the Common Market, including the PTA Bank, in disputes that arise out of the application and interpretation of the Staff Rules and Regulations of the Secretariat, or in respect of the terms and conditions of employment of the employees of the Institutions of the Common Market.

COMESA, not unlike a national government is comprised of several organs and institutions. As in government, public office means employment in the Civil

Service or in any other public sector capacity. Similarly those who work at the institutions of the Common Market, whether employed at the Secretariat or by an organ or institution of the Common Market, are also employees of the Common Market. They are international public officers in the COMESA Civil Service. The acts and decisions of all these organs and institutions, although they may be autonomous, are subject to challenge in this Court, which according to article 19 of the COMESA Treaty, is to ensure the adherence to law in the interpretation and application of the Treaty. It is for these officers, who may not have recourse to national courts, because of the immunity from process that their employers enjoy, for whom article 27 of the Treaty offers an avenue for redress. To interpret article 27 in such a way as to deprive them of access to this Court could not achieve the effect of striking down the mischief which the framers of the Treaty were desirous of obviating.

Finally, it was contended that Martin Ogang held the post of President of the PTA Bank because he was a director of the Bank and, therefore, not an employee of the Bank as perceived under article 27 of the Treaty. It is true that, generally speaking, directors are agents of their company. But directors may have a contract of employment with the company, such as service directors and managing directors. It is clear to us that remuneration of directors for their service, may be due either under a contract of employment, in which case if the contract is wrongfully terminated a cause of action will lie at the Director's instance; or determined by the general meeting in which case no action lies for termination of the office. But Martin Ogang, as Chief Executive of the PTA Bank, was not a director but acted in pursuance of the directions of the Board of Directors (see article 30 of the Charter). As such, he was in the service of the PTA Bank and has a right to a cause of action if his contract is wrongfully terminated.

From the provisions of article 27 (*supra*) it is evident that the Treaty, in granting this Court jurisdiction to determine claims by any person against the Common Market or its Institutions afforded Martin Ogang a right of action against the PTA Bank.

As to the *locus standi* of Martin Ogang, there are no Rules of the Court of Justice of the Common Market for Eastern and Southern Africa that have been breached, so as to deny Martin Ogang *locus standi* in this matter. He alleges the Bank breached the rules of natural justice and he has thereby suffered damage. Whether he can prove what he alleges is another matter altogether.

This application was supposed to have been heard on 22 March. On that day counsel for the PTA Bank applied for a deferment of the application on the ground that leading counsel was somewhere in the Middle East and would only be available after 11:00am on 23 March 2001. The Notice stipulating the date and time of hearing of this application was served on the legal representatives of the parties as early as 23 January 2001. This Court has a very tight schedule arising from the fact that it is composed of Judges from different countries, and we consider the omission of leading counsel to appear on the scheduled date to argue the application, and the refusal of his juniors to move the Court in terms of the application, a slight on this Court. It is for counsel to wait on the Court and not the Court to wait on counsel. Such a situation is unacceptable and one for which the party asking for deferment must be mulcted in costs.

Accordingly, the PTA Bank is ordered to bear the wasted costs of the abortive hearing on 22 March 2001.

The Court is satisfied that the application on both issues, is misconceived and is without merit and the same is accordingly dismissed with costs.

For the appellant:

Information not available

For the respondent:

Information not available

INTER-AMERICAN COURT OF HUMAN RIGHTS

ADVISORY OPINION OC-17/2002 OF 28 AUGUST 2002 REQUESTED BY THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

[1] Children's rights – Scope of children's rights – The persons, bodies and institutions to guarantee the rights – The best interest of the child – Meaning of the best interest of the child.

[2] Interpretation of treaties – Interpretation of the Inter-American Convention on Human Rights – The applicable guidelines.

[3] Jurisdiction of the Inter American Court of Human Rights – Jurisdiction over advisory opinions – Requirements that must be fulfilled – Jurisdiction over Conventions other than the Inter-American Convention on Human Rights.

Editor's Summary

The Inter-American Commission on Human Rights, filed a request for an Advisory Opinion before the Inter-American Court of Human Rights ("the Court") regarding interpretation of articles 8 and 25 of the American Convention, with the aim of determining whether the special measures set forth in article 19 of that same Convention establish "limits to the good judgment and discretion of the States" with respect to children, and it also requested that the Court express general and valid criteria on the matter in conformance to the framework of the American Convention.

The background for the request was that in various legal frameworks and practices of countries of the Americas, effective exercise of the rights and guarantees recognized by articles 8 and 25 of the American Convention was not complete with respect to children as individuals and actors under criminal, civil and administrative jurisdictions, as there was the assumption that the obligation of the State to supplement the minors' lack of full discernment could make said guarantees occupy a secondary position. This involved abridgment or restriction of minors' right to fair trial and to judicial protection. Therefore, it also affected other recognized rights whose effective exercise depends on effectiveness of the right to fair trial as well as the rights to humane treatment, to personal liberty, to privacy, and the rights of the family.

The Commission expressed that there were certain "interpretive premises" that State authorities applied when they adopted special protection measures in favor of minors, which tended to weaken their right to free trial. These measures were that: Minors were incapable of full discernment of their acts and therefore their participation, whether personally or through their representatives, was reduced or

annulled both in civil and in criminal proceedings; This lack of discernment and legal capacity was presumed by the judicial or administrative officials who, in making decisions based on what they believed to be the “best interests of the child,” attached less importance to those guarantees; Conditions in the child’s family milieu (economic situation and family cohesion, the family’s lack of material resources, educational situation, etc.) became key decisionmaking factors with respect to treatment when a child or adolescent was placed under criminal or administrative jurisdiction to decide on his or her responsibility and situation in connection with an alleged offense, or to determine measures that affect rights such as the right to a family, right of abode, or right to liberty, and considering that the minor was in an irregular situation (abandonment, dropping out of school, the family’s lack of resources, and so forth) may be used to justify application of measures usually reserved for punishment of crimes applicable only under due process.

In its request, the Commission asked the Court to issue a specific ruling on the compatibility with articles 8 and 25 of the American Convention of the following measures that some States adopted regarding minors: separation of young persons from their parents and/or family, on the basis of a ruling by a decision-making organ, made without due process, that their families are not in a position to afford their education or maintenance; deprivation of liberty of minors by internment in guardianship or custodial institutions on the basis of a determination that they have been abandoned or are prone to fall into situations of risk or illegality, motives which should not be considered of a criminal nature, but, rather, as the result of personal or circumstantial vicissitudes; the acceptance of confessions by minors in criminal matters without due guarantees; judicial or administrative proceedings to determine fundamental rights of the minor without legal representation of the minor; and, determination of rights and liberties in judicial and administrative proceedings without guarantees for the right of the minor to be personally heard; and failure to take into account the opinion and preferences of the minor in such determination.

Held – The requirements under the Rules of Procedure of the Inter American Court on Human Rights that must be fulfilled by the applicants are; precise statement of the questions on which the opinion of the Court is being sought, identification of the provisions to be interpreted, and the name and address of the Delegate, and submission of the considerations giving rise to the request, as well as identification of the international instruments other than the American Convention on which an interpretation is also requested Fulfillment of the requirements set forth in the Rules of Procedure regarding submission of a request for an advisory opinion does not mean that the Court is under the obligation to respond to it. In this regard, the Court must take into account considerations 72 that transcend merely formal aspects and that are reflected in the generic limits that the Court has recognized in exercising its advisory function.

The Inter American Court on Human Rights has set certain guidelines for interpretation of international provisions that do not appear in the American Convention, namely:

- (a) the general provisions set forth in the Vienna Convention on the Law of Treaties, especially the principle of good faith to ensure agreement of a norm with the object and purpose of the Convention,
- (b) the interpretation must take into account “the changes over time and present-day conditions,
- (c) the interpretation of other international instruments cannot be used to limit the enjoyment and exercise of a right; also, it must contribute to the most favorable application of the provision to be interpreted finally,
- (d) the Court could “interpret any treaty as long as it is directly related to the protection of human rights in a Member State of the inter-American system,” even if said instrument did not issue from the same regional protection system, and
- (e) [n]o good reason exists to hold, in advance and in the abstract, that the Court lacks the power to receive a request for, or to issue, an advisory opinion about a human rights treaty applicable to an American State merely because non- American States are also parties to the treaty or because the treaty has not been adopted within the framework or under the auspices of the inter-American system.

The Convention on the Rights of the Child has been ratified by almost all the member States of the Organization of American States. The large number of ratifications shows a broad international consensus (*opinio iuris comunis*) in favor of the principles and institutions set forth in that instrument, which reflects current development of this matter.

In giving advisory opinions, the Court must establish whether issuing an advisory opinion might “have the effect of altering or weakening the system established by the Convention in a manner detrimental to the individual human being.” And the court has a number of parameters in ascertaining this, one of them, which is consistent with most international case law on this subject matter, is that it might be inconvenient for there to be a premature determination on a theme or issue that might subsequently be brought before the Court in the context of a contentious case.

The existence of a controversy regarding interpretation of a provision is not, *per se*, an impediment to exercise its advisory function. The advisory jurisdiction of the Court differs from its contentious jurisdiction in that there are no “parties” involved in the advisory proceedings nor is there any dispute to be settled. The sole purpose of the advisory function is the interpretation of the Convention or of other treaties concerning the protection of human rights in the American states.

Adulthood brings with it the possibility of fully exercising rights, also known as the capacity to act. This means that a person can exercise his or her subjective rights personally and directly, as well as fully undertake legal obligations and conduct other personal or patrimonial acts. Children do not have this capacity, or lack this capacity to a large extent. Those who are legally disqualified are subject to parental authority, or in its absence, to that of guardians or representatives. But they are all subjects of rights, entitled to inalienable and inherent rights of the human person.

The notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified. It is impermissible to subject human beings to differences in treatment that are inconsistent with their unique and congenerous character.

No discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things. It follows that there would be no discrimination in differences in treatment of individuals by a state when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. These aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind.

The ultimate objective of protection of children in international instruments is the harmonious development of their personality and the enjoyment of their recognized rights. It is the responsibility of the State to specify the measures it will adopt to foster this development within its own sphere of competence and to support the family in performing its natural function of providing protection to the children who are members of the family.

Due to the conditions in which children find themselves, differentiated treatment granted to adults and to minors is not discriminatory per se, in the sense forbidden by the Convention. Instead, it serves the purpose of allowing full exercise of the children's recognized rights. It is understood that, in light of articles 1(1) and 24 of the Convention, the States cannot establish distinctions that lack an objective and reasonable justification and that do not have as their only objective, ultimately, exercise of the rights set forth in the Convention.

The regulating principle of the 'best interest of the child' is based on the very dignity of the human being, on the characteristics of children themselves, and on

the need to foster their development, making full use of their potential, as well as on the nature and scope of the Convention on the Rights of the Child.

To effectively protect children, all State, social or household decisions that limit the exercise of any right must take into account the best interests of the child and rigorously respect provisions that govern this matter in principle, the family should provide the best protection of children against abuse, abandonment and exploitation. And the State is under the obligation not only to decide and directly implement measures to protect children, but also to favor, in the broadest manner, development and strengthening of the family nucleus. Lack of material resources cannot be the only basis for a judicial or administrative decision that involves separation of the child from his or her family, and the resulting deprivation of other rights protected by the Convention.

The child must remain in his or her household, unless there are determining reasons, based on the child's best interests, to decide to separate him or her from the family. In any case, separation must be exceptional and, preferably, temporary. Effective and timely protection of the interests of the child and the family must be provided through intervention by duly qualified institutions, with appropriate staff, adequate facilities, suitable means and proven experience in this type of tasks. It is not enough for there to be jurisdictional or administrative bodies involved; they must have all the necessary elements to safeguard the best interests of the child. Education and care for the health of children require various measures of protection and are the key pillars to ensure enjoyment of a decent life by the children, who in view of their immaturity and vulnerability often lack adequate means to effectively defend their rights while procedural rights and their corollary guarantees apply to all persons, in the case of children exercise of those rights requires, due to the special conditions of minors, that certain specific measures be adopted for them to effectively enjoy those rights and guarantees.

From a criminal perspective associated with conduct that is defined and punishable as a crime, and with the consequent sanctions, chargeability refers to a person's capacity for culpability. If the person does not have this capacity, it is not possible to file charges in a lawsuit as in the case of a person who is chargeable. Chargeability is not an option when the person is unable to understand the nature of his or her action or omission and/or to behave in accordance with that understanding. It is generally accepted that children under a certain age lack that capacity. This is a generic legal assessment, one that does not examine the specific conditions of the minors on a case by case basis, but rather excludes them completely from the sphere of criminal justice.

There are children exposed to grave risk or harm who cannot fend for themselves, solve the problems that they suffer or adequately channel their own lives, whether because they absolutely lack a favorable family environment, supportive of their development, or because they have insufficient education, suffer

health problems or have deviant behavior that requires careful and timely intervention by well-prepared institutions and qualified staff to solve those problems or allay their consequences. Such children are not immediately deprived of rights and withdrawn from relations with their parents or guardians and from their authority. They do not pass into the “dominion” of the authorities, in such a manner that the latter, disregarding legal procedures and guarantees that preserve the rights and interests of the minor, take over responsibility for the case and full authority over the former. Under all circumstances, the substantive and procedural rights of the child remain safeguarded. Any action that affects them must be perfectly justified according to the law, it must be reasonable and relevant in substantive and formal terms, it must address the best interests of the child and abide by procedures and guarantees that at all times enable verification of its suitability and legitimacy.

Observance of the right to fair trial is mandatory in all proceedings where the personal liberty of an individual is at stake. The principles and acts of due legal process are an irreducible and strict set that may be expanded in light of new progress in human rights Law.

Pursuant to contemporary provisions set forth in International Human Rights Law, including article 19 of the American Convention on Human Rights, children are subjects entitled to rights, not only objects of protection. The phrase “best interests of the child”, set forth in article 3 of the Convention on the Rights of the Child, entails that children’s development and full enjoyment of their rights must be considered the guiding principles to establish and apply provisions pertaining to all aspects of children’s lives.

Children under 18 to whom criminal conduct is imputed must be subject to different courts than those for adults. Characteristics of State intervention in the case of minors who are offenders must be reflected in the composition and functioning of these courts, as well as in the nature of the measures they can adopt.

It is possible to resort to alternative paths to solve controversies regarding children, but it is necessary to regulate application of such alternative measures in an especially careful manner to ensure that they do not alter or diminish their rights.

Case referred to in judgment

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means explained; “**F**” means followed; “**O**” means overruled)

United Kingdom

A v United Kingdom [1998]

Z and others v United Kingdom [2001]

Others*Akdeniz and others v Turkey* [2001]*Castillo Petruzzi and others v Peru**Oneryildiz v Turkey* [2002]*Tanrikulu v Turkey* [1999]*Villagrán Morales and others v Guatemala* [1999-2001]*X and Y v The Netherlands* [1985]

EXCERPTS OF THE OPINION TRINDADE, ABREU-BURELLI, PACHECO-GÓMEZ, SALGADO-PESANTES OLIVER JACKMAN, GARCÍA-RAMÍREZ, CARLOS VICENTE DE ROUX-RENGIFO J AND VENTURA-ROBLES SECRETARY: On 30 March 2001 the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the Inter-American Commission”), in view of the provisions of article 64(1) of the American Convention on Human Rights (hereinafter “the American Convention”, “the Convention” or “Pact of San José”), filed a request for an Advisory Opinion (hereinafter “the request”) before the Inter-American Court of Human Rights (hereinafter “the Inter-American Court” or “the Court”) regarding interpretation of articles 8 and 25 of the American Convention, with the aim of determining whether the special measures set forth in article 19 of that same Convention establish “limits to the good judgment and discretion of the States” with respect to children, and it also requested that the Court express general and valid criteria on this matter in conformance to the framework of the American Convention.

According to the Inter-American Commission, the background for the request is that [i]n various legal frameworks and practices of countries of the Americas, effective exercise of the rights and guarantees recognized by articles 8 and 25 of the American Convention is not complete with respect to children as individuals and actors under criminal, civil and administrative jurisdictions, as there is the assumption that the obligation of the State to supplement the minors’ lack of full discernment can make said guarantees occupy a secondary position. This involves abridgment or restriction of minors’ right to fair trial and to judicial protection.

Therefore, it also affects other recognized rights whose effective exercise depends on effectiveness of the right to fair trial as well as the rights to humane treatment, to personal liberty, to privacy, and the rights of the family.

The Commission expressed that there are certain “interpretive premises” that State authorities apply when they adopt special protection measures in favor of minors, which tend to weaken their right to free trial. These measures are as follows:

- (a) Minors are incapable of full discernment of their acts and therefore their participation, whether personally or through their representatives, is reduced or annulled both in civil and in criminal proceedings.

- (b) This lack of discernment and legal capacity is presumed by the judicial or administrative officials who, in making decisions based on what they believe to be the “best interests of the child,” attach less importance to those guarantees.
- (c) Conditions in the child’s family milieu (economic situation and family cohesion, the family’s lack of material resources, educational situation, etc.) become key decision-making factors with respect to treatment when a child or adolescent is placed under criminal or administrative jurisdiction to decide on his or her responsibility and situation in connection with an alleged offense, or to determine measures that affect rights such as the right to a family, right of abode, or right to liberty.
- (d) Considering that the minor is in an irregular situation (abandonment, dropping out of school, the family’s lack of resources, and so forth) may be used to justify application of measures usually reserved for punishment of crimes applicable only under due process.

In its request, the Commission asked this Court to issue a specific ruling on the compatibility with articles 8 and 25 of the American Convention of the following measures that some States adopt regarding minors:

- (a) separation of young persons from their parents and/or family, on the basis of a ruling by a decision-making organ, made without due process, that their families are not in a position to afford their education or maintenance;
- (b) deprivation of liberty of minors by internment in guardianship or custodial institutions on the basis of a determination that they have been abandoned or are prone to fall into situations of risk or illegality, motives which should not be considered of a criminal nature, but, rather, as the result of personal or circumstantial vicissitudes[;]
- (c) the acceptance of confessions by minors in criminal matters without due guarantees;
- (d) judicial or administrative proceedings to determine fundamental rights of the minor without legal representation of the minor[and];
- (e) determination of rights and liberties in judicial and administrative proceedings without guarantees for the right of the minor to be personally heard; and failure to take into account the opinion and preferences of the minor in such determination.

1. PROCEEDINGS BEFORE THE COURT

(a) Competence

- (1) This request for an advisory opinion was filed before the Court by the Commission, exercising the authority granted by article 64(1) of the Convention, which states that:

“[t]he member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court.”

The aforementioned authority has been exercised in this case fulfilling the respective requirements as set forth in the Rules of Procedure: precise statement of the questions on which the opinion of the Court is being sought, identification of the provisions to be interpreted, and the name and address of the Delegate, and submission of the considerations giving rise to the request (article 59 of the Rules of Procedure), as well as identification of the international instruments other than the American Convention on which an interpretation is also requested (article 60(1)).

The Commission asked the Court to “interpret whether articles 8 and 25 of the American Convention on Human Rights constitute limits to the good judgment and discretion of the States to issue special measures of protection in accordance with article 19 of the Convention,” and for this it proposed five hypothetical practices for the Court to decide on their compatibility with the American Convention, as follows:

- (a) separation of young persons from their parents and/or family, on the basis of a ruling by a decision-making organ, made without due process, that their families are not in a position to afford their education or maintenance;
 - (b) deprivation of liberty of minors by internment in guardianship or custodial institutions on the basis of a determination that they have been abandoned or are prone to fall into situations of risk or illegality, motives which should not be considered of a criminal nature, but, rather, as the result of personal or circumstantial vicissitudes;
 - (c) the acceptance of confessions by minors in criminal matters without due guarantees;
 - (d) judicial or administrative proceedings to determine fundamental rights of the minor without legal representation of the minor; and
 - (e) determination of rights and liberties in judicial and administrative proceedings without guarantees for the right of the minor to be personally heard; and failure to take into account the opinion and preferences of the minor in such determination.
- The Court was also asked to issue “valid general criteria” regarding these matters.

Fulfillment of the requirements set forth in the Rules of Procedure regarding submission of a request for an advisory opinion does not mean that the Court is under the obligation to respond to it. In this regard, the Court must take into account considerations that transcend merely formal aspects and that are reflected in

the generic limits that the Court has recognized in exercising its advisory function. The said considerations are addressed in the following paragraphs.

The Commission requested a juridical interpretation of certain precepts of the American Convention, and subsequently expanded its proposal and requested the interpretation of other treaties, mainly the Convention on the Rights of the Child, insofar as these treaties might contribute to specify the scope of the American Convention. For this, the Court must first of all decide whether it is invested with the authority to interpret, by means of an advisory opinion, international treaties other than the American Convention, when their provisions contribute to specify the meaning and scope of provisions contained in the latter.

The Court has set certain guidelines for interpretation of international provisions that do not appear in the American Convention. For this, it has resorted to the general provisions set forth in the Vienna Convention on the Law of Treaties, especially the principle of good faith to ensure agreement of a norm with the object and purpose of the Convention. This Court has also established that interpretation must take into account “the changes over time and present-day conditions,” and that the interpretation of other international instruments cannot be used to limit the enjoyment and exercise of a right; also, it must contribute to the most favorable application of the provision to be interpreted.

Likewise, this Court established that it could “interpret any treaty as long as it is directly related to the protection of human rights in a Member State of the inter-American system,” even if said instrument did not issue from the same regional protection system, and that [n]o good reason exists to hold, in advance and in the abstract, that the Court lacks the power to receive a request for, or to issue, an advisory opinion about a human rights treaty applicable to an American State merely because non-American States are also parties to the treaty or because the treaty has not been adopted within the framework or under the auspices of the inter-American system.

The Court has also had the opportunity to refer specifically to the Convention on the Rights of the Child, to which the Commission refers in the instant request for an advisory opinion, through the analysis of articles 8, 19 and 25 of the American Convention. In the “Street Children” case (Villagrán Morales et al.), in which article 19 of the American Convention was applied, the Court resorted to article 1 of the Convention on the Rights of the Child as an instrument to define the scope of the concept of “child”.

In that case, the Court highlighted the existence of a “very comprehensive international corpus juris for the protection of the child” (which the Convention on the Rights of the Child and the American Convention are part of), which should be used as a source of law by the Court to establish “the content and scope” of the obligations undertaken by the State through article 19 of the American

Convention, specifically with respect to identification of the “measures of protection” to which the aforementioned precept refers.

Children constitute a group to whom the international community has paid much attention. The first international instrument regarding them was the 1924 Geneva Declaration, adopted by the International Association for the Protection of Children. This Declaration recognized that humanity must give children the best of itself, as a duty that is above all considerations of race, nationality, or creed.

At least 80 international instruments adopted during the 20th century are applicable to children in various degrees. Among them, the following stand out: the Declaration on the Rights of the Child, adopted by the General Assembly of the United Nations (1959), the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules, 1985), the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules, 1990) and the United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines, 1990). This same circle of child protection includes Agreement 138 and Recommendation 146 of the International Labor Organization and the International Covenant on Civil and Political Rights.

As regards the inter-American system for the protection of human rights, it is necessary to take into consideration Principle 8 of the American Declaration of the Rights and Duties of Man (1948) and article 19 of the American Convention, as well as articles 13, 15 and 16 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (“Protocol of San Salvador”).

With respect to the aforementioned article 19 of the American Convention, it is worth highlighting that when it was drafted there was a concern for ensuring due protection of children, by means of State mechanisms directed toward this end.

Today, this precept requires a dynamic interpretation that responds to the new circumstances on which it will be projected and one that addresses the needs of the child as a true legal person, and not just as an object of protection.

The Convention on the Rights of the Child has been ratified by almost all the member States of the Organization of American States. The large number of ratifications shows a broad international consensus (*opinio iuris comunis*) in favor of the principles and institutions set forth in that instrument, which reflects current development of this matter. It should be highlighted that the various States of the hemisphere have adopted provisions in their legislation, both constitutional and regular, regarding the matter at hand; the Committee on the Rights of the Child has repeatedly referred to these provisions.

If this Court resorted to the Convention on the Rights of the Child to establish what is meant by child in the framework of a contentious case, all the

more so can it resort to said Convention and to other international instruments on this matter when it exercises its advisory function, “relating not only to the interpretation of the Convention but also to ‘other treaties concerning the protection of human rights in the American states’”.

Following its practice regarding advisory opinions, the Court must establish whether issuing an advisory opinion might “have the effect of altering or weakening the system established by the Convention in a manner detrimental to the individual human being”.

The Court can use several parameters when it conducts this examination. One of them, which is consistent with most international case law on this subject matter, is that it might be inconvenient for there to be a premature determination on a theme or issue that might subsequently be brought before the Court in the context of a contentious case. However, this Court has stated that the existence of a controversy regarding interpretation of a provision is not, *per se*, an impediment to exercise its advisory function.

When it exercises its advisory function, the Court is not called upon to decide on matters of fact, but rather to elucidate the meaning, purpose and reason of international human rights provisions. The Court carries out its advisory function within this framework. The Court has asserted the distinction between its advisory and contentious jurisdiction several times, by stating that [t]he advisory jurisdiction of the Court differs from its contentious jurisdiction in that there are no “parties” involved in the advisory proceedings nor is there any dispute to be settled. The sole purpose of the advisory function is “the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states”.

The fact that the Court’s advisory jurisdiction may be invoked by all the Member States of the OAS and its main organs defines the distinction between its advisory and contentious jurisdictions.

The Court therefore observes that the exercise of the advisory function assigned to it by the American Convention is multilateral rather than litigious in nature, a fact faithfully reflected in the Rules of Procedure of the Court, article 62(1) of which establishes that a request for an advisory opinion shall be transmitted to all the “Member States”, which may submit their comments on the request and participate in the public hearing on the matter. Furthermore, while an advisory opinion of the Court does not have the binding character of a judgment in a contentious case; it does have undeniable legal effects.

Hence, it is evident that the State or organ requesting an advisory opinion of the Court is not the only one with a legitimate interest in the outcome of the procedure.

As it affirms its competence regarding this matter, the Court recalls the broad scope of its advisory function, unique in contemporary international law, which

enables it “to perform a service for all of the members of the inter-American system and is designed to assist them in fulfilling their international human rights obligations” and to assist states and organs to comply with and to apply human rights treaties without subjecting them to the formalism and the sanctions associated with the contentious judicial process.

The Court deems that pointing out a few examples serves the purpose of referring to a specific context and of illustrating the various interpretations that may exist regarding the juridical issue that is the subject matter of the instant Advisory Opinion being discussed, without this involving a juridical statement by the Court on the situation posed in said examples. The latter also allow the Court to point out that its Advisory Opinion is not mere academic speculation and that its interest is justified due to the benefit it may bring to international protection of human rights. In addressing the issue, the Court is acting in its role as a human rights tribunal, guided by the international instruments that govern its advisory jurisdiction, and it conducts a strictly juridical analysis of the questions posed to it.

Therefore the Court deems that it must examine the matters posed in the request that is now analyzed and it must issue the respective Advisory Opinion.

2. STRUCTURE OF THE OPINION

(a) Definition of Child

Article 19 of the American Convention, which orders special measures of protection in favor of children, does not define this concept. Article 1 of the Convention on the Rights of the Child states that a “child [is] every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”.

In the Beijing Rules, in the Tokyo Rules and in the Riyadh Guidelines, the terms “child” and “juvenile” are used to refer to the individuals to whom their provisions are directed. According to the Beijing Rules, a “juvenile is a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult”. The Tokyo Rules do not state any exceptions to the age limit of 18 years.

At this time, the Court will not address the implications of the various expressions used to refer to the members of this population group under the age of 18. Some of the positions expressed by participants in the proceedings in connection with this Opinion noted the difference between a child and a minor, from certain perspectives.

For the aims sought by this Advisory Opinion, the difference established between those over and under 18 will suffice.

Adulthood brings with it the possibility of fully exercising rights, also known as the capacity to act. This means that a person can exercise his or her subjective rights personally and directly, as well as fully undertake legal obligations and conduct other personal or patrimonial acts. Children do not have this capacity, or lack this capacity to a large extent. Those who are legally disqualified are subject to parental authority, or in its absence, to that of guardians or representatives. But they are all subjects of rights, entitled to inalienable and inherent rights of the human person.

Finally, taking into account international norms and the criterion upheld by the Court in other cases, “child” refers to any person who has not yet turned 18 years of age.

3. EQUALITY

... Article 24 of the Convention protects the principle of equality before the law. Thus, the general prohibition of discrimination set forth in article 1(1) “extends to the domestic law of the States Parties, permitting the conclusion that in these provisions the States Parties, by acceding to the Convention, have undertaken to maintain their laws free of discriminatory regulations”.

In an Advisory Opinion, the Court noted that [t]he notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified. It is impermissible to subject human beings to differences in treatment that are inconsistent with their unique and congenerous character.

Now, when the Court examined the implications of differentiated treatment given to the beneficiaries of certain provisions, it established that “not all differences in treatment are in themselves offensive to human dignity.” In this same sense, the European Court of Human Rights, based on “the principles that can be inferred from the juridical practice of a large number of democratic States,” warned that a distinction is only discriminatory when it “lacks objective and reasonable justification.” There are certain factual inequalities that may be legitimately translated into inequalities of juridical treatment, without this being contrary to justice. Furthermore, said distinctions may be an instrument for the protection of those who must be protected, taking into consideration the situation of greater or lesser weakness or helplessness in which they find themselves.

This Court also determined that:

“[a]ccordingly, no discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things. It follows that there would be no discrimination in differences in treatment of individuals by a state when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. These aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind.” (Infra 97).

The Inter-American Court itself has established that “it cannot be deemed discrimination on the grounds of age or social status for the law to impose limits on the legal capacity of minors or mentally incompetent persons who lack the capacity to protect their interests.”

At this point, it is appropriate to recall that article 2 of the Convention on the Rights of the child provides...

Likewise, the general principles of the Beijing Rules establish that [they] shall be applied to juvenile offenders impartially, without distinction of any kind, for example as to race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or other status.

In its General Comment 17 on the International Covenant on Civil and Political Rights, the Human Rights Committee pointed out that article 24(1) of that instrument recognizes the right of every child, with no discrimination, to the protection measures required by his or her condition as a child, both on the part of his or her family and on the part of society and the State. Applying this provision involves adopting special measures for protection of children in addition to those that the States must adopt, pursuant to article 2, to ensure that all persons enjoy the rights set forth in the Covenant. The Committee pointed out that the rights set forth in article 24 are not the only ones applicable to children: “as individuals, children benefit from all of the civil rights enunciated in the Covenant.”

The Committee also stated that:

“[t]he Covenant requires that children should be protected against discrimination on any grounds such as race, colour, sex, language, religion, national or social origin, property or birth. In this connection, the Committee notes that, whereas non-discrimination in the enjoyment of the rights provided for in the Covenant also stems, in the case of children, from article 2 and their equality before the law from article 26, the non-discrimination clause contained in article 24 relates specifically to the measures of protection referred to in that provision.”

The ultimate objective of protection of children in international instruments is the harmonious development of their personality and the enjoyment of their recognized rights. It is the responsibility of the State to specify the measures it will adopt to foster this development within its own sphere of competence and to

support the family in performing its natural function of providing protection to the children who are members of the family.

As was pointed out during the discussions on the Convention on the Rights of the Child, it is important to highlight that children have the same rights as all human beings minors or adults, and also special rights derived from their condition, and these are accompanied by specific duties of the family, society, and the State.

It can be concluded that, due to the conditions in which children find themselves, differentiated treatment granted to adults and to minors is not discriminatory *per se*, in the sense forbidden by the Convention. Instead, it serves the purpose of allowing full exercise of the children's recognized rights. It is understood that, in light of articles 1(1) and 24 of the Convention, the States cannot establish distinctions that lack an objective and reasonable justification and that do not have as their only objective, ultimately, exercise of the rights set forth in the Convention.

4. BEST INTERESTS OF THE CHILD

This regulating principle regarding children's rights is based on the very dignity of the human being, on the characteristics of children themselves, and on the need to foster their development, making full use of their potential, as well as on the nature and scope of the Convention on the Rights of the Child.

In this regard, principle 2 of the Declaration on the Rights of the Child (1959) sets forth...

The aforementioned principle is reiterated and developed in article 3 of the Convention on the Rights of the Child, which states:

- (1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration...

This matter is linked to those discussed in previous paragraphs, if we take into account that the Convention on the Rights of the Child refers to the best interests of the child (articles 3, 9, 18, 20, 21, 37 and 40) as a reference point to ensure effective realization of all rights contained in that instrument. Their observance will allow the subject to fully develop his or her potential. Actions of the State and of society regarding protection of children and promotion and preservation of their rights should follow this criterion.

By the same token, it should be noted that the preamble of the Convention on the Rights of the Child establishes that children require “special care,” and article 19 of the American Convention states that they must receive “special measures of protection.” In both cases, the need to adopt these measures or care originates from the specific situation of children, taking into account their weakness, immaturity or inexperience.

In conclusion, it is necessary to weigh not only the requirement of special measures, but also the specific characteristics of the situation of the child.

5. DUTIES OF THE FAMILY, SOCIETY AND THE STATE

(a) The family

To effectively protect children, all State, social or household decisions that limit the exercise of any right must take into account the best interests of the child and rigorously respect provisions that govern this matter.

In principle, the family should provide the best protection of children against abuse, abandonment and exploitation. And the State is under the obligation not only to decide and directly implement measures to protect children, but also to favor, in the broadest manner, development and strengthening of the family nucleus. In this regard, “[r]ecognition of the family as a natural and fundamental component of society,” with the right to “protection by society and the State,” is a fundamental principle of International Human Rights Law, enshrined in articles 16(3) of the Universal Declaration, VI of the American Declaration, 23(1) of the International Covenant on Civil and Political Rights and 17(1) of the American Convention.

Exceptional separation of the child from his or her family.

The child has the right to live with his or her family, which is responsible for satisfying his or her material, emotional, and psychological needs. Every person’s right to receive protection against arbitrary or illegal interference with his or her family is implicitly a part of the right to protection of the family and the child, and it is also explicitly recognized by articles 12(1) of the Universal Declaration of Human Rights, V of the American Declaration of the Rights and Duties of Man, 17 of the International Covenant on Civil and Political Rights, 11(2) of the American Convention on Human Rights, and 8 of the European Human Rights Convention.

These provisions are especially significant when separation of a child from his or her family is being analyzed.

The European Court has established that mutual enjoyment of harmonious relations between parents and children is a fundamental component of family life; and that even when the parents are separated, harmonious family relations must be ensured.

Measures that impede this enjoyment are an interference with the right protected by article 8 of the Convention. The Court itself has pointed out that the essential content of this precept is protection of the individual in face of arbitrary action by public authorities. One of the most grave interferences is that which leads to division of a family.

Any decision pertaining to separation of a child from his or her family must be justified by the best interests of the child...

This Court highlights the travaux préparatoires of the Convention on the Rights of the Child, which considered the need for separations of children from their family nucleus to be duly justified and preferably temporary, and for the child to be returned to his or her parents as soon as circumstances allow. The Beijing Rules (17, 18 and 46) made a similar statement.

Lack of material resources cannot be the only basis for a judicial or administrative decision that involves separation of the child from his or her family, and the resulting deprivation of other rights protected by the Convention.

In conclusion, the child must remain in his or her household, unless there are determining reasons, based on the child's best interests, to decide to separate him or her from the family. In any case, separation must be exceptional and, preferably, temporary.

(b) Institutions and staff

Effective and timely protection of the interests of the child and the family must be provided through intervention by duly qualified institutions, with appropriate staff, adequate facilities, suitable means and proven experience in this type of tasks. In brief, it is not enough for there to be jurisdictional or administrative bodies involved; they must have all the necessary elements to safeguard the best interests of the child.

In this regard, the third paragraph of article 3 of the Convention on the Rights of the Child stipulates that: ...

- (3) States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

This must permeate the activity of all persons intervening in the proceedings, who must discharge their respective duties taking into account both the nature of these, in general, and the best interests of the child vis-à-vis the family, society, and the State itself, specifically. Decisions on protection and fair trial do not suffice if the legal operators in the proceedings lack sufficient training on what the best interests of the child involve and, therefore, on effective protection of his or her rights. Living conditions and education of the child.

Regarding conditions for care of children, the right to life that is enshrined in article 4 of the American Convention does not only involve the prohibitions set forth in that provision, but also the obligation to provide the measures required for life to develop under decent conditions. The concept of a decent life, developed by this Court, relates to the norm set forth in the Convention on the Rights of the Child, article 23(1) of which states the following, with reference to children who suffer some type of disability:

- (1) States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

Full exercise of economic, social, and cultural rights of children has been associated with the possibilities of the State that is under the obligation (article 4 of the Convention on the Rights of the Child), which must make its best effort, in a constant and deliberate manner, to ensure access of children to those rights, and their enjoyment of such rights, avoiding regressions and unjustifiable delays, and allocating as many available resources as possible to this compliance. The International Conference on Population and Development (Cairo, 1994) highlighted that:

“[a]ll States and families should give highest possible priority to children. The child has the right to standards of living adequate for its well-being and the right to the highest attainable standards of health, and the right to education...”(Principle 11)

Likewise, the II World Conference on Human Rights (Vienna, 1993) stated specifically that [n]ational and international mechanisms and programmes should be strengthened for the defence and protection of children, in particular, the girl-child, abandoned children, street children, economically and sexually exploited children, including through child pornography, child prostitution or sale of organs, children victims of diseases including acquired immunodeficiency syndrome, refugee and displaced children, children in detention, children in armed conflict, as well as children victims of famine and drought and other emergencies.

In this regard, the International Conference on Population and Development also highlighted that [e]veryone has the right to education, which shall be directed to the full development of human resources, and human dignity and potential, with

particular attention to women and the girl-child. Education should be designed to strengthen respect for human rights and fundamental freedoms, including those relating to population and development.

It should be highlighted that the right to education, which contributes to the possibility of enjoying a dignified life and to prevent unfavorable situations for the minor and for society itself, stands out among the special measures of protection for children and among the rights recognized for them in article 19 of the American Convention.

Principle 7 of the Declaration on the Rights of the Child (1959) established...

The child shall have full opportunity for play and recreation, which should be directed to the same purposes as education; society and the public authorities shall endeavour to promote the enjoyment of this right.

In brief, education and care for the health of children require various measures of protection and are the key pillars to ensure enjoyment of a decent life by the children, who in view of their immaturity and vulnerability often lack adequate means to effectively defend their rights.

(c) Positive Obligations to Provide Protection

This Court has repeatedly established, through analysis of the general provision set forth in article 1(1) of the American Convention, that the State is under the obligation to respect the rights and liberties recognized therein and to organize public authorities to ensure persons under its jurisdiction free and full exercise of human rights. According to legal standards regarding international responsibility of the State that are applicable to International Human Rights Law, actions or omissions by any public authority, of any branch of government, are imputable to the State which incurs responsibility under the terms set forth in the American Convention. This general obligation requires the States Parties to guarantee the exercise and enjoyment of rights by individuals with respect to the power of the State, and also with respect to actions by private third parties. By the same token, and for the purposes of this Advisory Opinion, the States Party to the American Convention are under the obligation, pursuant to articles 19 (Rights of the Child) and 17 (Rights of the Family), in combination with article 1(1) of this Convention, to adopt all positive measures required to ensure protection of children against mistreatment, whether in their relations with public authorities, or in relations among individuals or with nongovernmental entities.

Likewise, according to the provisions set forth in the Convention on the Rights of the Child, children's rights require that the State not only abstain from unduly interfering in the child's private or family relations, but also that, according to the circumstances, it take positive steps to ensure exercise and full enjoyment of those rights. This requires, among others, economic, social and cultural measures.

In its first general comment, the Committee on the Rights of the Child specifically emphasized the major importance of the right to education. Accordingly, it is mainly through education that the vulnerability of children is gradually overcome. The State, given its responsibility for the common weal, must likewise safeguard the prevailing role of the family in protection of the child; and it must also provide assistance to the family by public authorities, by adopting measures that promote family unity.

It should be highlighted that the Committee on the Rights of the Child paid special attention to violence against children both within the family and at school. It pointed out that “the Convention on the Rights of the Child sets high standards for protection of children against violence, particularly in articles 19 and 28, as well as in articles 29, 34, 37, and 40, and others, ... taking into account the general principles contained in articles 2, 3 and 12”.

The European Court, referring to articles 19 and 37 of the Convention on the Rights of the Child, has recognized the right of the child to be protected against interference by actors other than the State, such as mistreatment by one of the parents; it has also recognized that if children are not cared for by their parents and their basic social needs are not satisfied, the State has the duty to intervene to protect them.

In conclusion, the State has the duty to adopt positive measures to fully ensure effective exercise of the rights of the child.

6. JUDICIAL OR ADMINISTRATIVE PROCEEDINGS INVOLVING CHILDREN

(a) Due process and guarantees

As stated above (*supra* 87), States have the obligation to recognize and respect rights and liberties of the human person, as well as to protect and ensure their exercise through the respective guarantees (article 1(1)), which are suitable means for them to be effective under all circumstances; both the corpus iuris of rights and liberties and their guarantees are inseparable concepts of the systems of values and principles distinctive of a democratic society. In such a society, “the rights and freedoms inherent in the human person, the guarantees applicable to them and the rule of law form a triad. Each component thereof defines itself, complements and depends on the others for its meaning”.

These fundamental values include safeguarding children, both because they are human beings with their inherent dignity, and due to their special situation. Given their immaturity and vulnerability, they require protection to ensure exercise of their rights within the family, in society and with respect to the State.

These considerations must be reflected in regulation of judicial or administrative proceedings where decisions are reached regarding children's rights and, when appropriate, those of the persons under whose custody or guardianship they find themselves.

The guarantees set forth in articles 8 and 25 of the Convention are equally recognized for all persons, and must be correlated with the specific rights established in article 19, in such a way that they are reflected in any administrative or judicial proceedings where the rights of a child are discussed.

It is evident that a child participates in proceedings under different conditions from those of an adult. To argue otherwise would disregard reality and omit adoption of special measures for protection of children, to their grave detriment. Therefore, it is indispensable to recognize and respect differences in treatment which correspond to different situations among those participating in proceedings.

In this regard, it should be recalled that the Court pointed out, in the Advisory Opinion on the Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, when it addressed this matter from a general perspective, that [t]o accomplish its objectives, the judicial process must recognize and correct any real disadvantages that those brought before the bar might have, thus observing the principle of equality before the law and the courts and the corollary principle prohibiting discrimination. The presence of real disadvantages necessitates countervailing measures that help to reduce or eliminate the obstacles and deficiencies that impair or diminish an effective defense of one's interests. Absent those countervailing measures, widely recognized in various stages of the proceeding, one could hardly say that those who have the disadvantages enjoy a true opportunity for justice and the benefit of the due process of law equal to those who do not have those disadvantages. (*supra* 47).

Finally, while procedural rights and their corollary guarantees apply to all persons, in the case of children exercise of those rights requires, due to the special conditions of minors, that certain specific measures be adopted for them to effectively enjoy those rights and guarantees.

(b) Participation of the child

The hypothetical situations proposed by the Inter-American Commission refer directly to participation of the child in proceedings where his or her own rights are discussed and where the decision has a significant bearing on his or her future life.

Article 12 of the Convention on the Rights of the Child contains adequate provisions regarding this point, with the aim of ensuring that intervention of the child is adjusted to his or her conditions and is not detrimental to his or her genuine interests...

From this same perspective, and specifically with respect to certain judicial proceedings, General Observation 13 on article 14 of the United Nations Covenant on Civil and Political Rights, pertaining to equality among all persons in terms of the right to be heard publicly by a competent court, pointed out that this provision applies both to regular and to special courts, and established that “minors must enjoy at least the same guarantees and protection granted to adults in article 14”.

This Court deems it appropriate to provide some specification regarding this issue. As stated above, the group defined as children includes all persons under 18 (*supra* 42). Evidently, there is great diversity in terms of physical and intellectual development, of experience and of the information known by those who are included in that group. The decision-making ability of a 3-year-old child is not the same as that of a 16-year-old adolescent. For this reason, the degree of participation of a child in the proceedings must be reasonably adjusted, so as to attain effective protection of his or her best interests, which are the ultimate objective of International Human Rights Law in this regard.

Finally, those responsible for application of the law, whether in the administrative or judiciary sphere, must take into account the specific conditions of the minor and his or her best interests to decide on the child's participation, as appropriate, in establishing his or her rights. This consideration will seek as much access as possible by the minor to examination of his or her own case.

7. ADMINISTRATIVE PROCESS

Protection measures adopted by administrative authorities must be strictly in accordance with the law and must seek continuation of the child's ties with his or her family group, if this is possible and reasonable (*supra* 71); in case a separation is necessary, it should be for the least possible time possible (*supra* 77); those who participate in decision-making processes must have the necessary personal and professional competence to identify advisable measures from the standpoint of the child's interests (*supra* 78 and 79); the objective of measures adopted must be to re-educate and re-socialize the minor, when this is appropriate; and measures that involve deprivation of liberty must be exceptional. All this enables adequate development of due process, reduces and adequately limits its discretion, in accordance with criteria of relevance and rationality.

8. JUDICIAL PROCEEDINGS

(a) Chargeability, criminal conduct and state of risk

To examine this issue, it is useful to identify certain concepts that are often used in this regard with better or worse judgment, such as those of chargeability, criminal conduct, and state of risk.

From a criminal perspective associated with conduct that is defined and punishable as a crime, and with the consequent sanctions, chargeability refers to a person's capacity for culpability. If the person does not have this capacity, it is not possible to file charges in a lawsuit as in the case of a person who is chargeable.

Chargeability is not an option when the person is unable to understand the nature of his or her action or omission and/or to behave in accordance with that understanding.

It is generally accepted that children under a certain age lack that capacity. This is a generic legal assessment, one that does not examine the specific conditions of the minors on a case by case basis, but rather excludes them completely from the sphere of criminal justice.

Provision 4 of the Beijing Rules, which is not binding, stated that criminal chargeability "shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity" of the child.

The Convention on the Rights of the Child does not refer explicitly to repressive measures for this type of situations, except in article 40(3) subparagraph (a), which establishes the obligation of the States Party to set a minimum age up to which it is presumed that the child cannot infringe penal or criminal laws.

This leads to consider the hypothesis that minors children, in the sense defined by the respective Convention- incur in unlawful conduct. State action (prosecuting, punitive measures, or those geared toward re-adaptation) is justified, both in the case of adults and in that of minors of a certain age, when the former or the latter carry out acts that criminal laws consider punishable. Therefore, it is necessary for the conduct that leads to State intervention to be defined as a crime. Thus, the rule of law is ensured in this delicate area of relations between the person and the State. This Court has stated that the principle of penal legality "means a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from behaviors that are either not punishable offences or are punishable but not with imprisonment." This guarantee, set forth in article 9 of the American Convention, must be granted to children.

One obvious consequence of the relevance of dealing in a differentiated manner with matters that pertain to children, and specifically those pertaining to an

unlawful behavior, is the establishment of specialized jurisdictional bodies to hear cases involving conduct defined as crimes and attributable to them. What was stated above regarding the age required for a person to be considered a child, according to the predominant international criteria, applies to this important matter. Therefore, children under 18 who are accused of conduct defined as crimes by penal law must be subject, for the case to be heard and appropriate measures to be taken, only to specific jurisdictional bodies different from those for adults. Thus, the Convention on the Rights of the Child addresses the “establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law” (article 40(3)).

It is unacceptable to include in this hypothesis the situation of minors who have not incurred in conduct defined by law as a crime, but who are at risk or endangered, due to destitution, abandonment, extreme poverty or disease, and even less so those others who simply behave differently from how the majority does, those who differ from the generally accepted patterns of behavior, who are involved in conflicts regarding adaptation to the family, school, or social milieu, generally, or who alienate themselves from the customs and values of their society. The concept of crime committed by children or juvenile crime can only be applied to those who fall under the first aforementioned situation, that is, those who incur in conduct legally defined as a crime, not to those who are in the other situations.

In this regard, Riyadh Guideline 56 states that “legislation should be enacted to ensure that any conduct not considered an offence or not penalized if committed by an adult is not considered an offence and not penalized if committed by a young person”.

Finally, it is appropriate to point out that there are children exposed to grave risk or harm who cannot fend for themselves, solve the problems that they suffer or adequately channel their own lives, whether because they absolutely lack a favourable family environment, supportive of their development, or because they have insufficient education, suffer health problems or have deviant behavior that requires careful and timely intervention (*supra* 88 and 91) by well-prepared institutions and qualified staff to solve those problems or allay their consequences.

Obviously, these children are not immediately deprived of rights and withdrawn from relations with their parents or guardians and from their authority. They do not pass into the “dominion” of the authorities, in such a manner that the latter, disregarding legal procedures and guarantees that preserve the rights and interests of the minor, take over responsibility for the case and full authority over the former.

Under all circumstances, the substantive and procedural rights of the child remain safeguarded. Any action that affects them must be perfectly justified according to the law, it must be reasonable and relevant in substantive and formal terms, it must address the best interests of the child and abide by procedures and guarantees that at all times enable verification of its suitability and legitimacy.

Neither do grave circumstances, such as those described above, immediately exclude the authority of the parents nor relieve them of the primary responsibilities that naturally fall to them, and which can only be modified or suspended, if that were the case, as the outcome of a proceeding in which rules applicable to infringement of rights are respected.

(b) Due process

Observance of the right to fair trial is mandatory in all proceedings where the personal liberty of an individual is at stake. The principles and acts of due legal process are an irreducible and strict set that may be expanded in light of new progress in human rights Law. As this Court established in its Advisory Opinion on The Right to Information on Consular Assistance within the Framework of the Guarantees of the.

(c) Due Process of Law

The judicial process is a means to ensure, insofar as possible, an equitable resolution of a difference. The body of procedures, of diverse character and generally grouped under the heading of the due process, is all calculated to serve that end. To protect the individual and see justice done, the historical development of the judicial process has introduced new procedural rights. An example of the evolutive nature of judicial process are the rights not to incriminate oneself and to have an attorney present when one speaks. These two rights are already part of the laws and jurisprudence of the more advanced legal systems. And so, the body of judicial guarantees given in article 14 of the International Covenant on Civil and Political Rights has evolved gradually. It is a body of judicial guarantees to which others of the same character, conferred by various instruments of International Law, can and should be added.

As regards the subject matter we are now addressing, the rules of due process have been set forth, mainly but not exclusively, in the Convention on the Rights of the Child, the Beijing Rules, the Tokyo Rules, and the Riyadh Guidelines, which safeguard the rights of children subject to various actions by the State, society, or the family.

The rules of due process and the right to fair trial must be applied not only to judicial proceedings, but also to any other proceedings conducted by the State, or under its supervision (*supra* 103).

At an international level, it is important to note that the States Party to the Convention on the Rights of the Child have undertaken the obligation to adopt a number of measures to safeguard due legal process and judicial protection, following similar parameters to those set forth in the American Convention on Human Rights.

These provisions are articles 37 and 40.

For the purposes of this Advisory Opinion, it is pertinent to state certain considerations regarding the various material and procedural principles, the application of

which is actualized in proceedings pertaining to minors, and which must be associated with the points examined above to set the complete framework regarding this matter. In this regard, it is also appropriate to consider the possibility and convenience of all procedural forms followed in those courts to have features of their own, in accordance with the characteristics and needs of the proceedings that take place there, bearing in mind the principle set forth in Convention on the Rights of the Child, that at this level can be reflected both in court intervention, as regards the form of procedural acts, and in the use of alternative means of solving controversies, mentioned below (infra 135 and 136): “Whenever appropriate and desirable, [measures will be adopted to deal with children who are accused of or recognized as having infringed the penal law], without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected”.

Article 40(3)(b) of the convention on the rights of the child.

(d) Competent, Independent and Impartial Court previously established by Law

Guaranteeing rights involves the existence of suitable legal means to define and protect them, with intervention by a competent, independent, and impartial judicial body, which must strictly adhere to the law, where the scope of the regulated authority of discretionary powers will be set in accordance with criteria of opportunity, legitimacy, and rationality. In this regard, Beijing Rule number 6 regulates the authority of judges to determine the rights of children:

- 6.1 In view of the varying special needs of juveniles as well as the variety of measures available, appropriate scope for discretion shall be allowed at all stages of proceedings and at the different levels of juvenile justice administration, including investigation, prosecution, adjudication and the follow-up of dispositions.
- 6.2 Efforts shall be made, however, to ensure sufficient accountability at all stages and levels in the exercise of any such discretion.
- 6.3 Those who exercise discretion shall be specially qualified or trained to exercise it judiciously and in accordance with their functions and mandates.

(e) Right to appeal and effective remedy

The aforementioned procedural guarantee is complemented by the possibility of actions of the lower court being reviewed by a higher one. This right has been reflected in article 8(2)(h) of the American Convention and in article 40(b) subparagraph (v) of the Convention on the Rights of the Child, which states:

- (v) If [the child is] considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law...

Article 25 of the American Convention provides that each person must have access to prompt and simple recourse. Amparo and habeas corpus are set within this framework, and they cannot be suspended, even in emergency situations.

The Beijing Rules also established the following parameters:

- 7.1 Basic procedural safeguards such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority shall be guaranteed at all stages of proceedings.

(f) Presumption of innocence

Article 8(2)(g) of the American Convention applies to this matter, when it states that: ...

- (2) Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees...
 - (g) The right not to be compelled to be a witness against himself or to plead guilty; and...

The aforementioned provision must be read in combination with article 40(2)(b) of the Convention on the Rights of the Child, which states that:

- (2) To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that...
 - (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
 - (i) To be presumed innocent until proven guilty according to law.

Likewise, Rule 17 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty states that juveniles who are detained under arrest or awaiting trial ("untried") are presumed innocent and shall be treated as such. Detention before trial shall be avoided to the extent possible and limited to exceptional circumstances. Therefore, all efforts shall be made to apply alternative measures. When preventive detention is nevertheless used, juvenile courts and investigative bodies shall give the highest priority to the most expeditious processing of such cases to ensure the shortest possible duration of detention. Untried detainees should be separated from convicted juveniles.

This Court has established that said principle "demands that a person cannot be convicted unless there is clear evidence of his criminal liability. If the evidence presented is incomplete or insufficient, he must be acquitted, not convicted".

Within the proceedings there are acts that are or have been considered especially far-reaching for the definition of certain juridical consequences that affect the sphere of rights and responsibilities of the parties. This category includes admission of guilt, understood as the recognition by the accused of the facts attributed to him or her, which does not necessarily mean that this recognition encompasses all issues that might be associated with those facts or their effects. It has also been understood that confession might involve an act of disposing of the goods or rights regarding which there is a controversy.

In this regard, and with respect to minors, it is relevant to point out that any statement by a minor, if it were indispensable, must be subject to the procedural protection measures that apply to minors, including the possibility of remaining silent, the assistance of legal counsel, and the statement being made before the authority legally empowered to receive it.

Furthermore, it is necessary to take into account that due to his or her age or other circumstances, the child may not be able to critically judge or to reproduce the facts on which he or she is rendering testimony and the consequences of his or her statement, and in this case the judge can and must be especially careful when assessing the statement. Evidently, the latter cannot be granted efficacy for purposes of the decision when it is made by persons who, precisely because they not have the civil capacity to act, and cannot make their will of their patrimony nor exercise their rights on their own (*supra* 41).

All the above would apply to a procedure in which the minor is involved and is to render testimony. As regards specifically penal proceedings the request for this Advisory Opinion referred to “criminal matters” it should be taken into account that minors are excluded from participating as accused parties in this type of trials.

Therefore, there should be no possibility of their rendering testimony that might correspond to the evidentiary category of an admission of guilt.

(g) Presence of both parties

All proceedings require certain elements for there to be the greatest possible balance among the parties for due defense of their interests and rights. This involves, among other things, application of the principle of the presence of both parties in the actions. This principle is addressed in the provisions of various instruments that require intervention of the child, whether personally or through representatives in the procedural acts, providing evidence and examining it, stating arguments, among others.

In this regard, the European Court has stated that:

The right to contradict in a proceeding for the purposes of article 6(1), as has been interpreted by case law, “in principle means the opportunity of the parties in a civil or

criminal trial to hear and analyze alleged evidence or observations included in the file ... with the aim of influencing the decision of the Court”.

(h) Principle of the public nature of the proceedings

When the proceedings address issues pertaining to minors, which affect their lives, it is appropriate to set certain limits to the broad principle of the public nature of the proceedings that applies to other cases, not regarding access by the parties to evidence and decisions, but rather regarding public observation of the procedural acts.

These limits take into account the best interests of the child, insofar as they protect him or her from opinions, judgments or stigmatization that may have a substantial bearing on his or her future life. In this regard, referring to article 40(2)(b) of the Convention on the Rights of the Child, the European Court has pointed out that “the privacy of children accused of crimes must be fully respected in all stages of the proceedings.” Likewise, the Council of Europe ordered the States Parties to review and change legislation with the aim of ensuring respect for the privacy of the child. In a similar manner, Beijing Rule 8.1 establishes that the privacy of minors must be respected at all stages of the proceedings.

(i) Alternative justice

International standards seek to exclude or reduce “judicialization” of social problems that affect children, which can and must be resolved, in many cases, through various types of measures, pursuant to article 19 of the American Convention, but without altering or diminishing the rights of individual persons. In this regard, alternative means to solve controversies are fully admissible, insofar as they allow equitable decisions to be reached without detriment to individuals’ rights.

Therefore, it is necessary to regulate use of alternative means in an especially careful manner in those cases where the interests of minors are at stake.

In this regard, article 40 of the Convention on the Rights of the Child reads:

- (3) States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular...
 - (b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

9. OPINION

For the foregoing reasons.

10. THE COURT

By six votes to one.

11. DECIDES

That it is competent to render the instant Advisory Opinion and that the request by the Inter-American Commission on Human Rights is admissible.

12. DECLARES

That for the purposes of this Advisory Opinion, a “child” or “minor” is any person who has not yet turned 18, unless he or she has attained majority, by legal mandate, before that age, under the terms set forth in paragraph 42.

13. AND IS OF THE OPINION

That pursuant to contemporary provisions set forth in International Human Rights Law, including article 19 of the American Convention on Human Rights, children are subjects entitled to rights, not only objects of protection.

That the phrase “best interests of the child”, set forth in article 3 of the Convention on the Rights of the Child, entails that children’s development and full enjoyment of their rights must be considered the guiding principles to establish and apply provisions pertaining to all aspects of children’s lives.

That the principle of equality reflected in article 24 of the American Convention on Human Rights does not impede adopting specific regulations and measures regarding children, who require different treatment due to their special conditions. This treatment should be geared toward protection of children’s rights and interests.

That the family is the primary context for children’s development and exercise of their rights. Therefore, the State must support and strengthen the family through the various measures it requires to best fulfill its natural function in this field.

That children’s remaining within their household should be maintained and fostered, unless there are decisive reasons to separate them from their families, based on their best interests. Separation should be exceptional and, preferably, temporary.

That to care for children, the State must resort to institutions with adequate staff, appropriate facilities, suitable means, and proven experience in such tasks.

That respect for life, regarding children, encompasses not only prohibitions, including that of arbitrarily depriving a person of this right, as set forth in article 4 of the American Convention on Human Rights, but also the obligation to adopt the measures required for children's existence to develop under decent conditions.

That true and full protection of children entails their broad enjoyment of all their rights, including their economic, social, and cultural rights, embodied in various international instruments. The States Parties to international human rights treaties have the obligation to take positive steps to ensure protection of all rights of children.

That the States Party to the American Convention have the duty, pursuant to articles 19 and 17, in combination with article 1(1) of that Convention, to take positive steps to ensure protection of children against mistreatment, whether in their relations with public officials, or in relations among individuals or with non-State entities.

That in judicial or administrative procedures where decisions are adopted on the rights of children, the principles and rules of due legal process must be respected. This includes rules regarding competent, independent, and impartial courts previously established by law, courts of review, presumption of innocence, the presence of both parties to an action, the right to a hearing and to defense, taking into account the particularities derived from the specific situation of children and those that are reasonably projected, among other matters, on personal intervention in said proceedings and protective measures indispensable during such proceedings.

That children under 18 to whom criminal conduct is imputed must be subject to different courts than those for adults. Characteristics of State intervention in the case of minors who are offenders must be reflected in the composition and functioning of these courts, as well as in the nature of the measures they can adopt.

That behavior giving rise to State intervention in the cases to which the previous paragraph refers must be described in criminal law. Other cases, such as abandonment, destitution, risk or disease, must be dealt with in a different manner from procedures applicable to those who commit criminal offenses. Nevertheless, principles and provisions pertaining to due legal process must also be respected in such cases, both regarding minors and with respect to those who have rights in connection with them, derived from family statute, also taking into account the specific conditions of the children.

That it is possible to resort to alternative paths to solve controversies regarding children, but it is necessary to regulate application of such alternative measures in an especially careful manner to ensure that they do not alter or diminish their rights.

JACKMAN J: I have, regretfully, found myself unable to join the majority of the Court in its decision to respond favourably to the “Request for an Advisory Opinion” dated 30 March 2001, by the Inter-American Commission on Human Rights (“the Commission”) because, in my view, the Request does not fulfill the criteria for admissibility set out in article 64 of the Convention, as consistently interpreted by this Court from the moment of its very first advisory opinion.

In its communication requesting the issuing of an advisory opinion, the Commission states the “objective” of the request in the following terms:

“The Commission deems it necessary to interpret whether articles 8 and 25 of the American Convention on Human Rights include limits to the good judgment and discretion of the States to issue special measures of protection in accordance with article 19 thereof and requires (sic) the Court to express general and valid guidelines in conformance to the framework of the Convention.”

The Commission then indicates the five “special measures of protection” on which it desires the Court to pronounce (cf paragraph 4 of this Opinion):

- (a) without guarantees for the separation of young persons (minors) from their parents and/or family, on the basis of a ruling by a decision-making organ, made without due process, that their families are not in a position to afford their education or maintenance;
- (b) deprivation of liberty of minors by internment in guardianship or custodial institutions on the basis of a determination that they have been abandoned or are prone to fall into situations of risk or illegality, motives (“causales”) which should not be considered of a criminal nature, but, rather, as the result of personal or circumstantial vicissitudes;
- (c) the acceptance of confessions by minors in criminal matters without due guarantees;
- (d) judicial or administrative proceedings to determine fundamental rights of the minor without legal representation of the minor; and
- (e) determination of rights and liberties in judicial and administrative proceedings the right of the minor to be personally heard; and failure to take into account the opinion and preferences of the minor in such determination.

With the greatest respect to the Inter-American Commission on Human Rights, the so-called “objective” of the requested advisory opinion is, in my view, vague almost to the point of meaninglessness, a vagueness that is fatally compounded by the “requirement” that the Court should express “general and valid guidelines”.

Repeatedly in its examination of the scope of the “broad ambit” (*el amplio alcance*) of its consultative function, (cf paragraph 34 of the present Opinion) the Court has insisted that the fundamental purpose of that function is to render a

service to member-states and organs of the Inter-American system in order to assist them “in fulfilling and applying treaties that deal with human rights, without submitting them to the formalities and the system of sanctions of the contentious process”.

It should not be forgotten that in the exercise of its vocation to “throw light on the meaning, object and purpose of the international norms on human rights [and], above all, to provide advice and assistance to the Member States and organs of the OAS in order to enable them to fully and effectively comply with their international obligations in that regard” “the Court is a judicial institution of the inter-American system” (OC1/82: paragraph 19) (my emphasis). As such, the Court should resist invitations to indulge in “purely academic speculation, without a foreseeable application to concrete situations justifying the need for an advisory opinion” (cf OC9/87, paragraph 16).

I would suggest that a request to provide “general and valid guidelines” to cover a series of hypotheses that reveal neither public urgency nor juridical complexity is, precisely, an invitation to engage in “purely academic speculation” of a kind which assuredly “would weaken the system established by the Convention and would distort the advisory jurisdiction of the Court.” (cf OC-1/82, paragraph 25).

For these reasons I have declined to participate in the deliberations on this Opinion, and herewith record my vote against it in its entirety.

TRINDADE J: I vote in favour of the adoption, by the Inter-American Court of Human Rights, of the present Advisory Opinion number 17 on the Juridical Condition and Human Rights of the Child, which constitutes, in my view, a new contribution of its recent case-law to the evolution of the International Law of Human Rights. The consultation formulated by the Inter-American Commission of Human Rights fits perfectly, in my view, into the wide jurisdictional basis of the advisory function of the Inter-American Court (article 64 of the American Convention on Human Rights), already clearly explained and established by this latter in its Advisory Opinion number 15 on the Reports of the Inter-American Commission of Human Rights (of 14 November 1997). The Court, thus, has the competence to interpret the relevant provisions (object of the present consultation) of the American Convention on Human Rights and of other treaties which bind the States of the region, besides the responsibility and the duty as determined by the American Convention to exert its advisory function, the operation of which is a matter of international order public.

(a) Prolegomena: Brief Conceptual Precisions

The preamble of the United Nations Convention on the Rights of the Child of 1989 warns that “in all countries in the world there are children living in exceptionally difficult conditions”, standing therefore in need of “special

consideration". Children abandoned in the streets, children overtaken by delinquency, child labour, enforced prostitution of children, traffic of children for sale of organs, children engaged in armed conflicts, children who are refugees, displaced and stateless persons, are aspects of the day-to-day contemporary tragedy of a world apparently without future.

I do not see how to avoid this sombre prognostic that, a world which does not take care of its children, which destroys the enchantment of their infancy within them, which puts a premature end to their childhood, and which subjects them to all sorts of deprivations and humiliations, effectively has no future. A tribunal of human rights cannot avoid taking account of this tragedy, with all the more reason when expressly requested to pronounce on aspects of the human rights of the child and of his juridical condition, in the exercise of its advisory function, endowed with a wide jurisdictional basis.

We all live in time. The passing of time affects our juridical condition. The passing of time should strengthen the bonds of solidarity which link the living to their dead, bringing them closer together. The passing of time should strengthen the ties of solidarity which unite all human beings, young and old, who experience a greater or lesser degree of vulnerability in different moments along their existence. Nevertheless, not always prevails this perception of the implacable effects of the passing of time, which consumes us all.

In a general way, it is at the beginning and the end of the existential time that one experiences greater vulnerability, in face of the proximity of the unknown (birth and early infancy, old age and death). Every social milieu ought, thus, to be attentive to the human condition. The social milieu which does not take care of its children has no future. The social milieu which does not take care of its elderly people has no past. And to count only on the escaping present is no more than a mere illusion.

In its resolutive point number 1, the present Advisory Opinion number 17 of the Inter-American Court provides that, "in conformity with the contemporary norms of the International Law of Human Rights, in which is found article 19 of the American Convention on Human Rights, the children are subjects of rights and not only object of protection". In fact, the subjects of law are the children, and not infancy or childhood. The subjects of law are the elderly persons, and not old age. The subjects of law are the persons with disabilities, and not disability itself. The subjects of law are the stateless persons, and not statelessness. And so forth. The limitations of legal capacity nothing subtract from legal personality. The titulaire of rights is the human being, of flesh and bone and soul, and not the existential condition in which he finds himself temporarily.

From the standpoint of the conceptual universe of the International Law of Human Rights, - in the framework of which are found, in my view, the human

rights of the child, – the titulaires of rights are the children, and not the infancy or childhood. An individual can have specific rights in virtue of the condition of vulnerability in which he finds himself (e.g. the children, the elderly persons, the persons with disabilities, the stateless persons, among others), but he remains always the titulaire of rights, as human person, and not the collectivity or the social group to which he belongs by his existential condition (e.g. the infancy or childhood, the old age, the disability, the statelessness, among others).

It is certain that the juridical personality and capacity keep a close relationship, but at the conceptual level they are distinguished from each other. It may occur that an individual may have juridical personality without enjoying, as a result of his existential condition, full capacity to act. Thus, in the present context, one understands by personality the aptitude to be titulaire of rights and duties, and by capacity the aptitude to exercise them by himself (capacity of exercise). Capacity is, thus, closely linked to personality; nevertheless, if by any situation or circumstance an individual does not enjoy full juridical capacity, this does not mean that thereby he is no longer subject of right. It is the case of the children.

Given the transcendental importance of the matter dealt with in the present Advisory Opinion number 17 of the Inter-American Court of Human Rights on the Juridical Condition and Human Rights of the Child, I feel obliged to leave on the records my thoughts on the matter, centred in six central aspects, which I consider of the greatest relevant in our days, and which conform a theme which has consumed me years of study and meditation, namely: first, the crystallization of the international juridical personality of the human being; second, the juridical personality of the human being as a response to a need of the international community; third, the advent of the child as a true subject of rights at international level; fourth, the subjective right, human rights and the new dimension of the international juridical personality of the human being; fifth, the implications and projections of the juridical personality of the child at international level; and sixth, the human rights of the child and the obligations of their protection *erga omnes*. Let us pass on to a succinct exam of each one of these aspects.

(b) The Crystallization of the International Juridical Personality of the Human Being

The crystallization of the international juridical personality of the human being constitutes, in my understanding, the most precious legacy of the legal science of the 20th century, which requires greater attention on the part of contemporary juridical doctrine. In this respect, International Law experiences today, at the beginning of the 21st century, in a way a return to the origins, in the sense in which it was originally conceived as a true *jus gentium*, the *droit des gens*. Already in the 16th and 17th centuries, the writings of the so-called founding fathers of International Law (especially those of F Vitoria, F Suárez and H Grotius, besides those of A Gentili and S Pufendorf) sustained the ideal of the *civitas maxima*

gentium, constituted by human beings organized socially in States and coextensive with humanity itself.

Regrettably, the thoughts and vision of the so called founding fathers of International Law (set forth notably in the writings of the Spanish theologians and in the Grotian writings), which conceived it as a truly universal system, came to be surpassed by the emergency of legal positivism, which personified the State, endowing it with a “will of its own”, reducing the rights of the human beings to those that the State “conceded” to them.

The consent of the will of the States (according to the voluntarist positivism) became the predominant criterion in International Law, denying *jus standi* to the individuals, to the human beings.

This rendered difficult the understanding of the international community, and undermined International Law itself, reducing it to a strictly inter-State law, no more above but rather among sovereign States. In fact, when the international legal order moved away from the universal vision of the so called “founding fathers” of the law of nations (*droit des gens/derecho de gentes*) (cf *supra*), successive atrocities were committed against the human kind. The disastrous consequences of this distortion are widely known.

Already by the end of the twenties, there emerged the first doctrinal reactions against this reactionary position. And by the mid-20th century the more lucid *jusinternacionalist* doctrine moved away definitively from the Hegelian and neo-Hegelian formulation of the State as the final depositary of the freedom and responsibility of the individuals who composed it, and that in it [in the State] integrated themselves entirely.

Against the doctrinal current of traditional positivism, which came to sustain that only the States were subjects of International Law, there emerged an opposing trend, sustaining, a *contrario sensu*, that, ultimately, only the individuals, addressees of all juridical norms, were subjects of International Law. It must never be forgotten that ultimately, the State exists for the human beings who compose it, and not vice-versa.

Meanwhile, there persisted the old polemics, sterile and pointless, between monists and dualists, erected upon false premises, which, not surprisingly, failed to contribute to the doctrinal endeavours in favour of the emancipation of the human being vis-à-vis his own State. In fact, what both the dualists and the monists did, in this particular, was to “personify” the State as subject of International Law. The monists discarded all anthropomorphism, affirming the international subjectivity of the State by an analysis of the juridical person; and the dualists did not contain themselves in their excesses of characterization of the States as sole subjects of International Law.

With the recognition of the legal personality of the human being at international level, International Law came to appear as a *corpus juris* of emancipation. There is no “neutrality” in Law; every Law is finalist, and the ultimate addressees of legal norms, both

national and international, are the human beings. In the mid-20th century, the juridical experience itself contradicted categorically the unfounded theory that the individuals were simple objects of the international juridical order, and destroyed other prejudices of State positivism. The legal doctrine of the time it made clear the recognition of the expansion of the protection of the individuals in the international legal order, as true subjects of law (of the law of nations).

In the ponderation of René Cassin, writing in 1950, for example, “all human creatures” are subjects of law, as members of the “universal society”, it being “inconceivable” that the State comes to deny them this condition. Human rights were conceived as inherent to every human being, independently from any circumstances in which he finds himself. By then, already, the individual came to be seen as subject *jure suo* of international law, such as the more lucid doctrine sustained, since that of the so-called founding fathers of the law of nations (*droit des gens*).

Also in the American continent, even before the adoption of the American and Universal Declarations of Human Rights of 1948, doctrinal manifestations flourished in favour of the international juridical personality of the individuals, such as those which are found, for example, in the writings of Alejandro Álvarez and Hildebrando Accioly. In fact, successive studies of the international instruments of international protection came to emphasize precisely the historical importance of the recognition of the international juridical personality of the individuals.

The whole new corpus juris of the International Law of Human Rights has been constructed on the basis of the imperatives of protection and the superior interests of the human being, irrespectively of his link of nationality or of his political statute, or any other situation or circumstance. Hence the importance assumed, in this new law of protection, by the legal personality of the individual, as subject of both domestic and international law. Nowadays one recognizes the responsibility of the State for all its acts – both *jure gestionis* and *jure imperii* and all its omissions, what brings to the fore the legal personality of the individuals and their direct access to international jurisdiction to vindicate their rights (including against their own State).

The State, created by the human beings themselves, and composed by them, exists for them, for the realization of their common good. For this recognition the considerable evolution in the last five decades of the International Law of Human Rights has contributed decisively, at international level, to which one may likewise add that of the International Humanitarian Law; also this latter considers the persons protected not as simple object of the established regulation, but rather as true subject of International Law. Ultimately, all Law exists for the human being, and the law of nations is no exception to that, guaranteeing to the individual his rights and the respect for his personality.

The “eternal return” or “rebirth” of jusnaturalism has been reckoned by the jusinternationalists themselves, much contributing to the assertion and the consolidation of the primacy, in the order of values, of the State obligations as to human rights, and of the recognition of their necessary compliance vis-à-vis the international community as a

whole. This latter, witnessing the moralization of Law itself, assumes the vindication of common superior interests. One has gradually turned to conceive a truly universal legal system.

(c) The Juridical Personality of the Human Being as a response to a Need of the International Community

Thus, International Law itself, in recognizing rights inherent to every human being, has disauthorized the archaic positivist dogma which, in an authoritarian way, intended to reduce such rights to those “conceded” by the State. The recognition of the individual as subject of both domestic law and international law, represents a true juridical revolution, to which we have the duty to contribute in the search for the prevalence of superior values, which comes at last to give an ethical content to the norms of both public domestic law and international law. This transformation, proper of our time, corresponds, in its turn, to the recognition of the necessity that all States are made answerable for the way they treat all human beings who are under their jurisdiction, so as to avoid new violations of human rights.

This rendering of accounts would simply not have been possible without the crystallization of the right of individual petition, amidst the recognition of the objective character of the positive obligations of protection and the acceptance of the collective guarantee of the compliance with them. This is the real meaning of the historical rescue of the individual as subject of the International Law of Human Rights. It is for this reason that, in my Concurring Opinion in the case of *Castillo Petruzzi and others v Peru* (Preliminary Objections, Judgment of 4 September 1998), urged by the circumstances of the *cas d'espèce*, I saw it fit to examine the evolution and crystallization of the right of international individual petition, which I qualified as a fundamental clause (*cláusula pétrea*) of the human rights treaties which provide for it. And I added:

“The right of individual petition shelters, in fact, the last hope of those who did not find justice at national level. I would not refrain myself nor hesitate to add, allowing myself the metaphor, that the right of individual petition is undoubtedly the most luminous star in the universe of human rights.”

In fact, the recognition of the juridical personality of the individuals fulfils a true necessity of the international community, which today seeks to guide itself by common superior values. As it can be inferred, e.g. from the historical case of the “Street Children” (case *Villagrán Morales and others v Guatemala* [1999–2001], before this Court the international juridical subjectivity of the individuals is nowadays an irreversible reality, and the violation of their fundamental rights, emanated directly from the international legal order, brings about juridical consequences.

In its Judgment as to the merits of 19 November 1999 in the aforementioned case of the “Street Children”, the Court significantly warned that:

“In the light of article 19 of the American Convention, the Court wishes to record the particular gravity of the fact that a State Party to this Convention can be charged with having applied or tolerated in its territory a systematic practice of violence against at-risk children. When States thus violate the rights of at-risk children, such as ‘street children’, this makes them victims of a double aggression. First, such States do not prevent them from living in misery, thus depriving them of the minimum conditions for a dignified life and preventing them from the ‘full and harmonious development of their personality’, even though every child has the right to harbour a project of life that should be tended and encouraged by the public authorities so that it may be developed for his personal benefit and that of the society to which he belongs. Second, they violate their physical, mental and moral integrity, and even their lives.”

The human being emerges, at last, even in the most adverse conditions, as ultimate subject of Law, domestic as well as international. The case of the “Street Children”, decided by the Inter-American Court, in which those marginalized and forgotten by the world succeeded to resort to an international tribunal to vindicate their rights as human beings, is truly paradigmatic, and gives a clear and unequivocal testimony that the International Law of Human Rights has achieved its maturity.

The doctrinal trend which still insists in denying to the individuals the condition of subjects of International Law is based on a rigid definition of these latter, requiring from them not only to possess rights and obligations emanated from International Law, but also to participate in the process of creation of its norms and of the compliance with them. It so occurs that this rigid definition does not sustain itself, not even at the level of domestic law, in which it is not required it has never been – from all individuals to participate in the creation and application of the legal norms in order to be subjects (*titulaires*) of rights, and to be bound by the duties, enmanated from such norms.

Besides unsustainable, that conception appears contaminated by an ominous ideological dogmatism, which had as the main consequence to alienate the individual from the international legal order. It is surprising if not astonishing, besides regrettable, to see that conception repeated mechanically and ad nauseam by a part of doctrine, apparently trying to make believe that the intermediary of the State, between the individuals and the international legal order, would be something inevitable and permanent. Nothing could be more fallacious. In the brief historical period in which that Statist conception prevailed, in the light or, more precisely, in the darkness of legal positivism, successive atrocities were committed against the human being, in a scale without precedents.

It results quite clear today that there is nothing intrinsic to International Law that impedes or renders it impossible to non-State actors to enjoy international

legal personality. No one in sane conscience would today dare to deny that the individuals effectively possess rights and obligations which emanate directly from International Law, with which they find themselves, therefore, in direct contact. And it is perfectly possible to conceptualize even with greater precision as subject of International Law any person or entity, titulaire of rights and obligations, which emanate directly from norms of International Law. It is the case of the individuals, who thus have strengthened this direct contact – without intermediaries with the international legal order.

The truth is that the international subjectivity of the human being (whether a child, an elderly person, a person with disability, a stateless person, or any other) erupted with all vigour in the legal science of the 20th century, as a reaction of the universal juridical conscience against the successive atrocities committed against the human kind. An eloquent testimony of the erosion of the purely inter-State dimension of the international legal order is found in the historical and pioneering Advisory Opinion number 16 of the Inter-American Court, on the Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law of 1 October 1999, which has served as orientation to other international tribunals and has inspired the evolution in statu nascendi of the international case-law on the matter.

In that Advisory Opinion, the Inter-American Court lucidly pointed out that the rights set forth in article 36.1 of the Vienna Convention on Consular Relations of 1963 “have the characteristic that their titulaire is the individual. In effect, this provision is unequivocal in stating that the rights to consular information and notification are ‘accorded’ to the interested person. In this respect, article 36 is a notable exception to the essentially Statist nature of the rights and obligations set forth elsewhere in the Vienna Convention on Consular Relations; as interpreted by this Court in the present Advisory Opinion, it represents a notable advance in respect of the traditional conceptions of International Law on the matter”.

In this way, the Inter-American Court reconized, in the light of the impact of the corpus juris of the International Law of Human Rights in the international legal order itself, the crystallization of a true individual subjective right to information on consular assistance, of which is titulaire every human being deprived of his freedom in another country; furthermore, it broke away from the traditional purely inter-State outlook of the matter, giving support to numerous migrant workers and individuals victimized by poverty, deprived of freedom abroad. The present Advisory Opinion number 17 of the Inter-American Court, on the Juridical Condition and Human Rights of the Child, fits into the same line of assertion of the juridical emancipation of the human being, in stressing the consolidation of the juridical personality of the children, as true subject of law and not simple object of protection.

The juridical category of the international legal personality has not shown itself insensible to the necessities of the international community, among which appears with prominence that of providing protection to the human beings who compose it, in particular those who find themselves in a situation of special vulnerability, as do the children. In fact, doctrine and international case-law on the matter sustain that the subjects of law themselves in a legal system are endowed with attributes that fulfil the needs of the international community.

Hence, as Paul de Visscher points out perspicaciously, mientras que “the concept of juridical person is unitary as concept”, given the fundamental unity of the human person who “finds in herself the ultimate justification of her own rights”, the juridical capacity, on its turn, reveals a variety and multiplicity of scopes. But such varieties of the extent of the juridical capacity, including its limitations in relation to, e.g. the children, the elderly persons, the persons with mental disability, the stateless persons, among others, in nothing affect the juridical personality of all human beings, juridical expression of the dignity inherent to them.

Thus, in sum, every human person is endowed with juridical personality, which imposes limits to State power. The juridical capacity varies in virtue of the juridical condition of each one to undertake certain acts. Yet, although such capacity of exercise varies, all individuals are endowed with juridical personality. Human rights reinforce the universal attribute of the human person, given that to all human beings correspond likewise the juridical personality and the protection of the Law, independently of her existential or juridical condition.

(d) The Advent of the Child as a True Subject of Rights at International Level

On the basis of all this notable development is found the principle of the respect for the dignity of the human person, independently of her existential condition. In virtue of this principle, every human being, irrespectively of the situation and the circumstances in which he finds himself, has the right to dignity. This fundamental principle is invoked in the preambles of the United Nations Convention on the Rights of the Child of 1989 as well as of the Declaration of the Rights of the Child of 1959. It appears likewise in the preamble of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador, of 1988), among other treaties and international instruments of human rights.

It is also found, and it could not be otherwise, – in the present Advisory Opinion of the Inter-American Court, when this latter places, in the scale of the fundamental values, “the safeguard of the children, both by their condition of human beings and the dignity inherent to them, as by the special situation in which they find themselves. As a result of their immaturity and vulnerability, they require

a protection that guarantees the exercise of their rights within the society and with regard to the State” (paragraph 93).

It is certain, as the Court points out in the present Advisory Opinion on the Juridical Condition and Human Rights of the Child, that only along the 20th century the corpus juris of the rights of the child was articulated, in the framework of the International Law of Human Rights (paragraphs 26-27), conceived the child as a true subject of law. This occurred with the impact notably of the aforementioned Declaration (1959) and Convention (1989) on the Rights of the Child, as well as the Minimum Rules of the United Nations for the Administration of the Justice of Minors (Beijing, 1985), and on the Measures Not in Deprivation of Freedom (Tokyo, 1990), and the United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyad, 1990), besides the general treaties of human rights.

That is, the rights of the child at last detached themselves from the *patria potestas* (from Roman law) and from the conception of the indissoluble character of marriage (from canon law). In the law of family itself, enriched by the recognition, in the 20th century, of the rights of the child, at international level, - the foundation of parental authority becomes the “superior interest of the child”, whose statute or juridical condition acquires at last an autonomy of its own.

It is surprising that, in face of this notable development of the contemporary legal science, there still exists a doctrinal trend which insists in the view that the Convention on the Rights of the Child limits itself to create State obligations. This posture seems to me unconvincing and juridically unfounded, as such obligations exist precisely in virtue of the human rights of the child set forth in that Convention of the United Nations and other international instruments of protection of human rights.

Moreover, that trend of thought fails to appreciate precisely the great achievement of contemporary legal science in the present domain of protection, namely, the recognition of the child as subject of law. This is, in my view, the Leitmotiv which permeates the present Advisory Opinion on the Juridical Condition and Human Rights of the Child as a whole. In fact, the Inter-American Court of Human Rights does not hesitate to affirm that all human beings, irrespectively of their existential condition, are subjects of inalienable rights, which are inherent to them (paragraph 41), and to stress the imperative to fulfil the needs of the child “as a true subject of law and not only as object of protection” (paragraph 28).

The child comes to be treated as a true subject of right, being in this way recognized his own personality, distinct even from those of his parents. Thus, the Inter-American Court sustains, in the present Advisory Opinion, the preservation of the substantive and procedural rights of the child in all and any circumstances (paragraph 113). The Kantian conception of the human person as an end in herself

comprises naturally the children, all the human beings independently of the limitations of their juridical capacity (of exercise).

All this extraordinary development of the jusinternationalist doctrine in this respect, along the 20th century, finds its roots, as it so happens, in some reflections of the past, in the juridical as well as philosophical thinking. This is inevitable, as it reflects the process of maturing and refinement of the human spirit itself, which renders possible the advances in the human condition itself.

Thus, as to the juridical domain, I limit myself to rescue a passage of a magisterial course delivered by Paul Guggenheim at the Hague Academy of International Law in 1958. On the occasion, that jurist pertinently recalled that, already in the 17th century, Hugo Grotius, who so much had contributed to the autonomy of the jus gentium (detaching it from scholastic thinking), sustained that the rules pertaining to the capacity of the children in civil matters belonged to the *droit des gens* itself.

As to philosophical thinking, in his Treatise on Education (better known as the *Émile*, 1762), Jean-Jacques Rousseau appears as a precursor of the modern conceptualization of the rights of the child, in warning, with great sensitiveness, that one ought to respect infancy, to let “nature work”, that wishes the children to be children (with their own way of seeing, thinking and feeling) before being adults. Human intelligence, Rousseau kept on warning, has its limits, cannot learn everything, and the existential time is brief. At the beginning “we do not know to live, soon we will be able to”; reason and judgment “come slowly”, while “prejudices overwhelm”. One, thus, ought not to lose sight of the passing of time, ought to have it always in mind, and one ought to know to respect the ages of the human existence.

(e) The Subjective Right, Human Rights and the New Dimension of the International Juridical Personality of the Human Being

There is no way to dissociate the recognition of the international juridical personality of the individual from the dignity itself of the human person. In a wider dimension, the human person appears as the being who brings within himself his supreme end, and who achieves it throughout his life, under his own responsibility. In fact, it is the human person, essentially endowed with dignity, who articulates, expresses and introduces the “ought to be” (“*deber ser*”) of the values in the world of the reality in which he lives, and only is he capable of this, as bearer of such ethical values. The juridical personality, in its turn, manifests itself as a juridical category in the world of Law, as a unitary expression of the aptitude of the human person to be titulaire of rights and duties at the level of the regulated behaviour and human relations.

It may be recalled, in the present context, that the conception of individual subjective right already has a wide historical projection, originated in particular in the jusnaturalist thinking in the 17th and 18th centuries, and systematized in the

juridical doctrine along the 29th century. Nevertheless, in the 29th century and the beginning of the 20th century, that conception remained in the framework of domestic public law, emanated from public power, and under the influence of legal positivism. The subjective right was conceived as the prerogative of the individual such as defined by the legal order at issue (the objective law).

Notwithstanding, there is no way to deny that the crystallization of the concept of individual subjective right, and its systematization, achieved at least an advance towards a better understanding of the individual as a titulaire of rights. And they rendered possible, with the emergence of human rights at international level, the gradual overcoming of positive law. In the mid-20th century, the impossibility became clear of the evolution of Law itself without the individual subjective right, expression of a *de true* “human right”.

As I saw it fit to sustain in my Concurring Opinion in the historical Advisory Opinion number 16 of this Court on the Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law of 1 October 1999, we nowadays witness “the process of humanization of international law, which today encompasses also this aspect of consular relations. In the confluence of these latter with human rights, the subjective individual right to information on consular assistance, of which are titulaires all human beings who are in the need to exercise it, has crystallized: such individual right, inserted into the conceptual universe of human rights, is nowadays supported by conventional international law as well as by customary international law” (paragraph 35).

The emergence of universal human rights, as from the proclamation of the Universal Declaration of 1948, came to expand considerably the horizon of contemporary legal doctrine, disclosing the insufficiencies of the traditional conceptualization of the subjective right. The pressing needs of protection of the human being have much fostered this development. Universal human rights, superior to, and preceding, the State and any form of politico-social organization, and inherent to the human being, affirmed themselves as oposable to the public power itself.

The international juridical personality of the human being crystallized itself as a limit to the discretion of State power. Human rights freed the conception of the subjective right from the chains of legal positivism. If, on the one hand, the legal category of the international juridical personality of the human being contributed to instrumentalize the vindication of the rights of the human person, emanated from International Law, on the other hand the corpus juris of the universal human rights conferred upon the juridical personality of the individual a much wider dimension, no longer conditioned by the law emanated from the public power of the State.

(f) Implications and Projections of the Juridical Personality of the Child at International Level

The convergence of points of view, expressed in the course of the present advisory procedure, both in written form and in the oral pleadings before the Inter-American Court during the public hearing of 21 June 2002, in support of the position of the children as true subjects of law and not and not as simple object of protection, cannot pass unnoticed.

In this same sense manifested themselves, e.g. the two intervening States, Mexico and Costa Rica, as well as the Inter-American Commission on Human Rights, besides specialized organisms such as the Inter-American Institute of the Child, the Latin-American United Nations Institute for the Prevention of Delict and the Treatment of the Delinquent (ILANUD), besides non-governmental organizations, such as the Centre for Justice and International Law (CEJIL) and the Foundation Rafael Preciado Hernández (of Mexico). This convergence of points of view as to the juridical condition of the children as titulaires of rights established in the International Law of Human Rights highly significant, as such recognition, besides reflecting a true change of paradigm, represents, ultimately, the *opinio juris comunis* in our days on the matter.

But it is not sufficient to affirm that the child is subject of right, it is important that he knows about it, including for the development of his responsibility. Hence the transcendental relevance of education in general, and of human rights education in particular, duly recognized in the present Advisory Opinion (paragraphs 84-85 and 88). It is not difficult to reckon the precocious manifestations of some great vocations, at times very early in life. Every child has effectively the right to create and develop his own project of life. In my view, the acquisition of knowledge is a form perhaps the most effective one of human emancipation, and indispensable for the safeguard of the rights inherent to every human being.

The corpus juris of the human rights of the child has conformed itself as a response of the human conscience to its needs of protection. The fact that the children do not enjoy full legal capacity to act, and that they therefore have to exercise their rights by means of other persons, does not deprive them of their juridical condition of subjects or right. No one would dare to deny the imperative of the observance, as from the dawn of life, of the rights of the child, e.g. the freedoms of conscience, thought and expression. Special relevance has been attributed to the respect for the points of view of the child, set forth in article 12 of the United Nations Convention on the Rights of the Child, which, in its turn, has fostered a holistic and integral vision of human rights.

Besides the wide scope of this duty, as formulated in article 12 of the Convention of 1989, comprising the right of the child to be heard (directly or by

means of a legal representative) in judicial or administrative proceedings in which he participates, and to have his points of view taken into account, in practice the Committee on the Rights of the Child (of the United Nations) has attributed capital importance to it, reflected in its general guidelines for the elaboration of the initial and periodic (State) reports. In circumstances of commission of a delict, the approach of that corpus juris of the rights of the child in relation to the minor who commits the infraction ends up by being that of a guarantee, oriented towards the development of the responsibility of this latter; in no circumstance, as it can be inferred from the present Advisory Opinion, is the child deprived of his legal personality, with all the juridical consequences ensuing therefrom.

In the light of the previous considerations, it is undeniable that the international juridical subjectivity of the human being has been affirmed and expanded in the last decades (cf *supra*), and that the child (as titulaire of rights) is no exception to that. In the face of the limitations of the juridical capacity of the child (to exercise his rights for himself), a legal representative is recognized to him. But independently of such limitations, the juridical personality of the child, as of every human being, projects itself at international level. As it is not possible to conceive rights emanated directly from International Law without the prerogative of vindicating them, the whole evolution of the matter has oriented itself towards the crystallization of the right of the individual including the child to resort directly to the international jurisdictions.

The experience of the application of the European Convention on Human Rights provides examples of concrete cases in which children have effectively made use of the right of international individual petition under the Convention. Thus, for example, the petitioners in the case *X and Y v The Netherlands* [1985] before the European Court of Human Rights were a girl child (of 16 years of age) and her father (cf *infra*). More recently, in the cases *Tanrikulu v Turkey* [1999], *Akdeniz and others v Turkey* [2001], and *Oneryildiz v Turkey* [2002], adults and children appeared as petitioners jointly, in denunciations of violations of the right to life. In the case *A v United Kingdom* [1998], a 9-year old child acted as petitioner (cf *infra*).

In this way, a child, even though not endowed with juridical capacity in the national legal system at issue, can, nevertheless, make use of the right of individual petition to the international instances of protection of his rights. But once interposed the petition, he must, of course, count on a legal representative, if he is legally incapable. There is no reason why such representation be conditioned by provisions of any domestic law. As I saw it fit to point out in my aforementioned Concurring Opinion in the case *Castillo Petruzzi and others v Peru* (Preliminary Objections, 1998) before the Inter-American Court, the conditions for the exercise of the right of international individual petition do not necessarily coincide with the criteria of domestic law pertaining to *locus standi*, and there is a whole jurisprudence constante in clear support of the autonomy of the right of individual petition at

international level vis-à-vis concepts and provisions of domestic law (paragraphs 21-22).

(g) The Human Rights of the Child and the Obligations of Their Protection Erga Omnes

The preceding considerations lead me to my last line of thoughts, pertaining to the resolatory point number 9 of the present Advisory Opinion of the Inter-American Court on the Juridical Condition and Human Rights of the Child, which provides that “The States Parties to the American Convention have the duty, in accordance with articles 19 and 17, in relation to article 1.1 of it, to take all positive measures which secure the protection to the children against ill-treatment, either with regard to public authorities, or in inter-individual relations or with non-State entities”.

In this respect, in its Judgment in the aforementioned case of the “Street Children” (*Villagrán Morales and others v Guatemala*, of 19 November 1999), in which “a context of much violence against the children and youth who lived in the streets” was established (paragraphs 167 and 79), the Inter-American Court pointed out “the particular gravity of the instant case since the victims were youths, three of them children, and because the conduct of the State not only violated the express provision of article 4 of the American Convention, but also numerous international instruments, widely accepted by the international community, which devolve to the State the duty to adopt special measures of protection and assistance for the children under its jurisdiction”.

The advances, in the present context, at the juridical level (cf *supra*), cannot make us forget the current deterioration of basic social policies everywhere, aggravating the economic-social problems which so much affect children, and which transform the necessity to secure the right to create and develop their project of life an undeniable question of justice. The recurring, and aggravated, problems, which nowadays affect the children (added to the tragedy of refugee, displaced and stateless children, and of the children involved in armed conflicts), warn that we remain far from their “integral protection”. Nevertheless, one ought to persevere in the endeavours in favour of the prevalence of the general principle of the “superior interest of the child”, enshrined into article 3 of the United Nations Convention on the Rights of the Child, and evoked in the present Advisory Opinion (paragraphs 56-61), from which emanates their dignity as human beings.

In the aforementioned case *X and Y v The Netherlands* [1985] before the European Court of Human Rights, concerning sexual abuse to the detriment of a 16-year old girl child with mental disability, with traumatic consequences for the direct victim, aggravating her mental disturbances, the European Court pointed out that the concept of “private life” (under article 8 of the European Convention) encompassed the physical and moral integrity of the person (including her sexual

life). In the case, added the Court, “fundamental values and essential aspects of private life” were at issue, and required the adoption of positive measures on the part of the State so as to secure the respect for private life also in the sphere of inter-individual relations. The Court concluded that the respondent State had violated article 8 of the Convention, as the pertinent provisions of the Dutch Penal Code did not secure to the victim a “practical and effective protection”.

That is, the Court concluded that the Netherlands had violated article 8 of the Convention for not providing the legal protection against abuses (to the detriment of a girl child) in the private or inter-individual relations. We are here before the State duty to take positive measures of protection of the children, among the other individuals, not only vis-à-vis the public authorities, but also in relation with other individuals and non-State actors. This is a clear example of obligations of protection of the children (and all those in need of protection) truly *erga omnes*.

In two other recent cases, *A v United Kingdom* [1998] and *Z and others v United Kingdom* [2001], the European Court affirmed the obligation of the respondent State to take positive measures to protect the children against ill-treatment, including that inflicted by other individuals (paragraphs 22 and 73, respectively). It is precisely in this private ambit that abuses are often committed against children, in face of the omission of public power, – what thus requires a protection of the human rights of the child *erga omnes*, that is, including in the inter-individual relations (*Drittwirkung*).

This is a context in which, definitively, the obligations of protection *erga omnes* assume special relevance. The foundation for the exercise of such protection is found in the American Convention on Human Rights itself. The general obligation which is set forth in its article 1.1 to respect and to ensure respect for the protected rights including the rights of the child, as stipulated in article 19 requires from the State the adoption of positive measures of protection (including for preserving the preponderant role of the family, foreseen in article 17 of the Convention, in the protection of the child – paragraph 88), applicable *erga omnes*. In this way, article 19 of the Convention comes to be endowed with a wider dimension, protecting the children also in the inter-individual relations.

The present Advisory Opinion of the Inter-American Court on the Juridical Condition and Human Rights of the Child gives a notable contribution to the jurisprudential construction of the *erga omnes* obligations of protection of the rights of the human person in every and any circumstances. The Advisory Opinion affirms categorically the general duty of the States Parties to the American Convention, as guarantors of the common good, to organize public power so as to guarantee to all persons under their respective jurisdictions the free and full exercise of the conventionally protected rights, an obligation which is susceptible to being required not only in relation to the State power but also in relation to “actions of private third parties” (paragraph 87).

At a moment in which the sources of violations of the rights of the human person are regrettably diversified, the understanding of the Court could not be otherwise. This is the interpretation which imposes itself, in conformity with the letter and the spirit of the American Convention, and capable of contributing to the fulfilment of its object and purpose. Just as the Court sustained in its recent Resolution of Provisional Measures of Protection (of 18 June 2002) to the benefit of the members of the Community of Peace of San José of Apartadó (Colombia), and of the persons who render services to this latter, in the present Advisory Opinion number 17 the Court again stresses, correctly, that the protection of the rights of the human person applies *erga omnes*.

This is an imperative of international ordre public, which implies the recognition that human rights constitute the basic foundation, themselves, of the legal order. And the values, which are always underlying it, besides being perfectly identifiable, see to it to give them concrete expression. It is not to pass unnoticed, for example, that already the preamble of the Universal Declaration of Human Rights of 1948 invoked the “conscience of mankind”. And, one decade later, the preamble of the Declaration on the Rights of the Child of 1959 warned with all propriety that “mankind owes to the child the best it has to give”.

In sum, in the domain of the International Law of Human Rights, moved by considerations of international ordre public, we are before common and superior values, truly fundamental and irreducible, seized by human conscience. This latter is always present, it has accompanied and fostered the whole evolution of the jus gentium, of which – I firmly believe is the material source par excellence.

In concluding this Concurring Opinion, I allow myself to return to my starting-point.

We all live in time. Each one lives in his time, which ought to be respected by the others.

It is important that each one lives in his time, in harmony with the time of the others. The child lives in the minute, the adolescent lives in the day, and the adult, already “impregnated of history”, lives in the epoch; those who already departed, live in the memory of those who remain and in eternity. Each one lives in his time, but all human beings are equal in rights.

From the perspective of an international tribunal of human rights like the Inter-American Court, one ought to affirm the human rights of the children (and not the so-called “rights of the childhood or infancy”), as from their juridical condition of true subjects of law, endowed with international legal personality; one has, moreover, to develop all the potentialities of their legal capacity. I have always sustained that the International Law of Human Rights will achieve its plenitude the day when is definitively consolidated the recognition not only of the personality, but also of the international legal capacity of the human person, as subject of

inalienable rights, in all and any circumstances. In the *jus gentium* of our days, the importance of the consolidation of the international legal personality and capacity of the individual, irrespectively of his existential time, is much greater than what one may *prima facie* assume.

In fact, as the Law ineluctably recognizes juridical personality to every human being (whether he is a child, an elderly person, a person with disability, a stateless person, or any other), irrespectively of his existential condition or of his juridical capacity to exercise his rights for himself (capacity of exercise), – we may, thus, visualize a true right to the Law (*derecho al Derecho*), that is, the right to a legal order (at domestic as well as international levels) which effectively protects the rights inherent to the human person.

The recognition and consolidation of the position of the human being as full subject of the International Law of Human Rights constitutes, in our days, an unequivocal and eloquent manifestation of the advances of the current process of humanization of International Law itself (*jus gentium*), to which we have the duty to contribute, as the Inter-American Court of Human Rights has done in the present Advisory Opinion number 17 on the Juridical Condition and Human Rights of the Child.

RAMÍREZ J: The request for an Advisory Opinion received and considered by the Court OC17/2002, on the “Legal status and human rights of children” to which this Concurring Opinion is attached, reflects among other matters a concern with identifying and adequately defining the limits of the power of the State to act with respect to children under certain extremely important assumptions. These must be carefully delimited:

- (a) conduct, by action or omission, that has been legally defined as criminal, in other words, that is a criminal offense; and
- (b) a situation which involves no legally defined crime and where there is a need for such an action for the real or alleged benefit of the minor. This viewpoint, which I do not necessarily share but which nevertheless expresses those assumptions, would lead us to refer to “juvenile offenders” or to “criminal children or youths”, in the former case, and to “minors in irregular situations” or “at risk”, in the latter. Needless to say, these terms today have a strong “unfavorable connotation”, or at least one that is controversial. The great debate begins or ends with the very use of those expressions.

It is worth pointing out that the borderline between those two hypotheses must be subordinated to the nature of the facts or the respective situations of each one, from the standpoint of the rights recognized and protected by the juridical order in my opinion, from the level of the national Constitution itself and the gravity of the detriment caused to them or the danger they face. In a democratic society, the legislative authority must carefully observe the limits of each hypothesis, in

accordance with its nature, and consequently establish the appropriate regulation. It is not acceptable for a conduct to be placed within one of the aforementioned categories solely by the free discretion of the legislative body, without taking into account Constitutional decisions and principles that govern legislators' tasks when they "select" the conducts that must be considered criminal, as well as the respective juridical consequences.

In this Vote, as in Advisory Opinion OC17 itself, the terms "child" and "minor" are used in their most rigorous sense (paragraph 39), and at the same time in that which is farthest from any disqualifying, biased or pejorative intention. Language is a system of codes. I must define the scope of those I now use, adhering to the way the Court has used them in this Advisory Opinion, to place them above or beyond according to each one's preference a debate that casts more shadows than light. The word "minor", widely used at a national level, refers to a person who has not yet reached the age at which full or broad exercise of his or her rights has been established there, together with the respective duties and responsibilities. As a rule, this borderline coincides with the ability to enjoy civil rights, or many of them (a possibility that arises in the past: since birth, or even before that), and the ability to exercise them (a possibility that unfolds toward the future, where the borderline is crossed toward an autonomous exercise of rights by the person entitled to them). The meaning of the word "child", in turn, has in principle been more biological or biopsychological than juridical, and this meaning, that is in line with popular usage of the term, contrasts with adolescent, youth, adult, or elderly persons.

The concept of a "child" coincides with that of a "minor" when the former and the latter are juridicized, so to speak, and they concur under the same consequences of Law.

The United Nations Convention on the Rights of the Child, often invoked in the instant Advisory Opinion, considers children to be persons under 18, "unless under the law applicable to the child, majority is attained earlier" (article 1) (paragraph 42). This grants a precise legal meaning to the term child, and as such it places this concept and this subject as a reference point to assign multiple juridical consequences. Needless to say, the word child here encompasses adolescents, because it thus arises from this widely ratified Convention, and it also includes girls, according to the rules of our language. The Inter-American Court itself declares the scope of the terms "child" and "minor" for purposes of the Advisory Opinion. Allow me, then, to avoid constant use of the exuberant expression: boy-child, girl-child, and adolescent (which could be expanded if we also establish a distinction between male and female adolescents).

Neither the statement by the Court in this regard nor the Whereas paragraphs nor the specific opinions in the last part of OC17 differentiate in any way that would allow a distinction to be established on the basis of or in connection with

good judgment or the so called presumption regarding capability (or incapability) of actual malice. Such distinctions would, in turn, create new sub-sets within the larger group of children. It is, then, understood that the age of 18 is a precise borderline between two ages that involve two distinctive situations in the ambit of this Opinion: one, regarding those who find themselves outside the subjective validity of normal criminal rules, and the other pertaining to those who are subject to them.

When the Advisory Opinion refers to a specific treatment of children or minors, and distinguishes it from that given to adults or persons who have attained majority, in my opinion this entails the assumption that the system applicable to adults cannot be transferred or applied to minors (paragraph 109). This, of course, does not hinder:

- (a) the existence of principles and rules applicable, by their very nature, to both groups (human rights, guarantees), whatever modalities are reasonable or, even, necessary in each case, and
- (b) the existence, in the ambit of minors, of differences derived from the diverse development among individuals under 18: there is, in effect, a major difference between those who are 8 or 10 years old and those who are 16 or 17. There are also differences which I do not intend to examine now in the other group, that of adults, for various reasons; the most obvious example is that of those who have lost their faculty of reasoning.

Early, the points I mentioned in paragraph 1, (*supra*), would also be of interest if we were dealing with an adult or a “person who has attained majority”, and in fact they have determined some of the more protracted, intense, and significant developments associated with democracy, the Rule of Law, liberties, human rights, and guarantees. These themes with their respective values come to the forefront when the public authorities face “criminal” individuals, on the one hand, or “marginal or destitute” individuals on the other. In this confrontation, as longstanding as it is dramatic, the most relevant individual rights to life, liberty, humane treatment, patrimony- are at stake, and the most impressive, though not necessarily justified or persuasive, arguments are put forward to legitimize the actions of the State, as well as their characteristics and objectives, whether acknowledged or unspeakable.

Nevertheless, the point becomes more complex when in addition to its sensitivity due to the subject matter irregularity, extravagance, marginality, dangerousness, crime, members of an especially vulnerable human group are involved, often lacking the personal abilities to adequately face certain problems, due to lack of experience, immaturity, weakness, lack of information or of training; or when they do not meet the requirements of the law to freely manage their own interests and exercise their rights in an autonomous manner (paragraph 10). Such is

the situation of children or minors, who on the one hand generally and in a relative manner as different factors generate diverse situations lack those personal requirements, and on the other hand exercise of their rights is restricted or halted, *ope legis*. It is natural that in this “mine-strewn terrain” abuse may appear and thrive, often shrouded by paternal discourse or one of redemption, which can hide the severest authoritarianism.

In the criminal system of the remote past, adults and minors were subject to similar if not identical rules, eased in the case of the latter by benevolence issuing from a humane attitude or based on the lack of or diminished judgment (subject to demonstration, because *malitia supplet aetatem*). The various ages of the individual could also establish different degrees of subjection to criminal justice and its distinctive consequences.

Extreme minority up to seven or nine years of age, for example could lead to complete exclusion from access to criminal justice, though not to all State justice. For older but still not juvenile children, the consequences of criminal conduct or intervention of criminal justice were moderated in accordance with the level of good judgment that the individual could exercise to appreciate and govern his or her own conduct. Finally, attaining another, juvenile age between 16 and 21 made the individual fully responsible for his or her conduct, and therefore subject to criminal prosecution and conviction. In actual “penal life”, things did not always happen as was sought by legislation or good sense: there are abundant stories both forensic or criminological and literary about the indistinct incarceration of children, adolescents, youths and adults in the same detention centers.

In a period somewhat longer than the last century, the idea of setting a clear-cut boundary between minors and adults took root; the former would be subject to semipaternal action or jurisdiction by the State, while the latter legally qualified according to criminal Law would be subject to regular criminal justice. It was then said that criminal chargeability would begin at the threshold age, and that under that age there would be absolute immunity from prosecution, established by law. This certainty was reflected in a centenarian expression: “*L’enfant est sorti du Droit pénal*”.

I will not expand at this time on the relevance or irrelevance of referring in this regard, as is often done, to “immunity from prosecution”, or of using other concepts that can better explain the distinction between adults and minors for purposes of criminal Law. If it is considered, as accredited doctrine and many criminal laws do, that chargeability is the capacity to understand the lawfulness of one’s own conduct and to behave in accordance with that understanding, it follows that chargeability is not a group theme, but rather an individual one; in effect, one is or is not chargeable depending on that capacity, which one does or does not personally have. Assignment of chargeability or immunity from prosecution *ope legis* to a broad human group, by virtue of the age they all have, and not each one’s

capacity, is a useful fiction which answers to the needs and expectations of a certain policy apropos of youth's protection and development, but not of the specific reality the only one that exists of each one's case.

In any case, the delimitation, which was supposed to be uniform, has never been so: different boundaries prevailed in various countries, and there also were or are different boundaries within a single country under a federal system. The situation is quite diverse even among countries that have common juridical values, as in the case of Europe: the age for criminal responsibility is seven years in Cyprus, Ireland, Switzerland, and Liechtenstein; eight in Scotland; thirteen in France; fourteen in Germany, Austria, Italy, and several East European States; fifteen in the Scandinavian countries; sixteen in Portugal, Poland, and Andorra, and eighteen in Spain, Belgium, and Luxembourg.

Distribution of the population between these two major sectors, for purposes of responsibility for unlawful conduct, involved the establishment or development of different jurisdictions *latu sensu*, differentiated juridical orders as well as procedures and institutions for each one. In the case of adults, this development coincided with the apogee of the principle of criminal and procedural legality, which gave rise to a more or less demanding system of guarantees. In the case of minors, instead, removal from criminal justice led to the establishment of "paternalistic or protective" jurisdictions based on the idea that the State relieves parents or guardians of custody or guardianship, and undertakes their functions with their usual scope and characteristics. In the Anglo Saxon tradition, the roots of this idea are found in the *parens patriae* system, which connects with the principle of the king as father of the realm.

Evolution and adaptation of this way of addressing the issue of juvenile offenders is related to the idea of the "social State," broadly empowered to undertake economic, social, educational, or cultural tasks. That same tendency to intervene and take over functions, which previously were the sole responsibility of other instances with arguments worthy of consideration and in relation to pressing realities, to a certain extent encouraged the State to move into the ambit of parenthood and guardianship. If parents or guardians can decide on the development of their children with considerable liberty, even adopting measures of authority that would not be applicable to adults outside judicial proceedings, the "parent or guardian State" might do the same, setting aside, to this end, the formalities and guarantees of regular Law: from legality in definition of conducts that give rise to intervention and the nature and duration of the respective measures, to the procedures to reach decisions and implement them.

National legislation and case law, supported by a doctrine that seemed innovative at the time, strengthened the paternalistic position of public authorities in various countries.

In the United States, these ideas took root after an 1838 Pennsylvania Supreme Court order: *Ex parte Crouse*. In Mexico, almost a hundred years later, a well known judgment by the Supreme Court of Justice, rendered in the amparo case brought by Ezequiel Castañeda against acts of the Minors' Court and the respective law, stated the traditional criterion: in that case, the State did not act "as an authority, but rather performing a social mission and substituting the private citizens entrusted by the law and by the juridical tradition of Western civilization to carry out an educational and corrective action with respect to minors". This defined the path that would be followed regarding this matter, in a more or less peaceful manner, for many years. Taking into account the parental and protective role undertaken, which juridically explained and justified the actions of the State, as well as the purpose given to its intervention in these affairs, which roughly coincided with the intention to correct or recover that prevailed in the case of adults, this way of acting and the line of thought that backed it, were given a name which has survived until our times: "protective."

The protective approach, understood as stated in the paragraphs above, was at the time an interesting step forward from the previously prevailing system. It sought to, and effectively did, remove minors from the spaces where justice was applied to adult offenders. Since it was understood that children do not commit crimes and therefore cannot be classified nor treated as criminals, but rather as "sui generis" offenders, it sought to exclude them from the world of regular criminals. It also noted the enormous weight that the judicial apparatus can apply on minors, and assumed that it was preferable to establish procedures and organize bodies that did not have the "profile and clamor" of regular justice, the results of which had not, precisely, been satisfactory in the case of minors.

Handing children over to this method to solve their "behavior problems," understood as "problems with the law," brought with it various difficult questions that led to its being questioned increasingly and gave rise to proposals to substitute it with a different system.

First of all, the extraordinary flexibility of the protective concept regarding conduct that could determine State intervention brought into the same framework for attention, action and decision-making, acts that were legally defined as crimes and others that were not.

This included certain domestic conflicts which should be solved by the parents and were transferred, due to their incompetence or for their convenience, to correctional bodies of the State. This confusion brought to the same courts and institutions those who had committed legally-defined grave crimes and those who had incurred in more or less slight "errors of conduct", that should have been addressed from a different perspective. This gave rise to questioning of the protective approach: "the protective pretext can hide very grave injuries of all sorts (to the right to legal representation, to freedom of movement, to custody, to the

family). Juvenile law, understood as “protective law,” has been rightly questioned several years ago and no one can forget that, historically, the worst aberrations have been committed with protective pretexts: against heretics, against infidels, etc.”

Likewise, when the State took over the authority of parents and guardians, it not only took control of and captured minors, but it also violently deprived adults of certain rights under family statute. Furthermore, the intention to exclude the legal definition and form of the regular trial, together with the idea that the State is not in conflict with the child, but rather the best guarantor of his or her well-being proceedings that were not contentious and therefore had no procedural parties, led to minimizing participation of the minor and of those legally responsible for him or her in the procedural acts, setting aside certain acts that in regular Law are part of “due legal process,” and suppression of the system of guarantees that contributes to control of actions by the State to moderate its strength and its discretion for the sake of legality, which must ultimately benefit justice.

These and other problems gave rise, as I mentioned before, to a strong reaction that demanded a return or evolution, if one prefers to state it thus toward different legal methods, that involve a significant sum of guarantees: first of all, substantive and procedural legality that can be verified and controlled. Erosion of the former system began from various angles. A very significant one was jurisprudence: just as it had strongly exalted the *parens patriae* doctrine, it would demolish the solutions linked to that doctrine and establish a new guarantee-based system. In the United States, a famous Supreme Court order of 15 May 1967, *In re Gault*, effected a turn in the direction that would subsequently prevail, reinstating certain essential rights of minors: to be informed of the charges, to have legal counsel, to examine witnesses, to not incriminate themselves, to have access to the file, and to appeal. The reaction gave rise to a different system, one that is usually referred to by the expressive name of a “guarantee-based” system. This name denotes the reinstatement of guarantees essentially, the minors’ rights, as well as those of their parents in the system applied to juvenile offenders.

Actually, increasing criminal waves and among them crime by children or youths in “youthful societies,” such as the Latin American ones, which lead to equally growing and understandable demands by public opinion, have triggered legal and institutional changes that seem to define one of the most important and significant current positions of society and the State. These disturbing changes include a reduction in the age of access to criminal justice, with the resulting growth of the universe of those potentially subject to criminal justice: with each reduction of that age, millions of persons enter that universe, having been children or adults the day before and having become adults by legislative agreement. Transformation of procedures with respect to minors has obviously brought with it the application of legal definitions that are typical of criminal proceedings, together with the penal customs or culture that are inherent to them.

Currently there is in many countries, as was clearly seen in the course of the proceedings (briefs and statements at the 21 June 2002 public hearing) (paragraph 15) leading to the Advisory Opinion to which this Opinion is attached, a strong debate between schools of thought, trends or concepts: on the one hand, the protective system, associated with the doctrine of the “irregular situation” which “means nothing else, it has been stated, than legitimizing indiscriminate judicial action regarding those children and adolescents who are in difficult situations”- and on the other hand, the guarantee-based system, linked to what has been called the doctrine of “comprehensive protection” which “refers to a series of international juridical instruments that express a fundamental qualitative leap in social consideration of childhood;” there is thus a movement from the “minor as an object of compassion-repression, to children and adolescents as full subjects of rights.” There has been an acute polarization between these two schools of thought, and their encounter or confrontation poses a fundamental dilemma of sorts, which can sometimes generate “fundamentalisms” with their characteristic styles. This dilemma is posed in very simple terms: either the protective system or the guarantee-based system.

If one takes into account that the protective approach has as its emblem that of treating the minor in accordance with his or her specific conditions and providing the protection that he or she requires (hence the term “protection”), and that the guaranteebased approach is substantially concerned with recognition of minors’ rights and legal responsibilities, identification of minors as subjects, rather than objects of the proceedings, and control of acts of the authorities by means of the relevant system of guarantees, it is possible to note that there is no essential or radical opposition between one and the other intent. Neither do the basic goals of the protective project contradict those of the guarantee-based project, nor do those of the latter contradict those of the former, if both of them are considered in their essential aspects, as I do in this Opinion and as has been done, in my view, in the Advisory Opinion, which does not adhere to any specific doctrine.

How can we, in effect, deny that a child is in a different situation from that of an adult, and that diverse situations may rationally require diverse approaches? Or that the child requires, because of these characteristic conditions, special, different and more intense and meticulous protection than an adult, if there is any for the latter? And how can we deny, on the other hand, that the child above all, a human being- is entitled to irreducible rights, some of which are generic while others are specific? And that he or she is not and cannot be seen as an object of the proceedings, subject to the discretion or whim of the authorities, but rather as a subject of the proceedings, since he or she has true and respectable rights, both substantive and procedural? And that in his or her case, as in any other, procedures must abide by clear and legitimate rules and be subject to control through a system of guarantees?

If that is true, then probably the time has come to leave behind the false dilemma and recognize the true dilemmas that are present in this field. Those of us who at one time addressed these issues rightly or mistakenly, and now seeking to overcome mistakes or, better, to move forward by revising concepts that are no longer justified. Have had to correct our earliest assertions and reach new conclusions. Real contradictions and therefore dilemmas, antinomies, true conflicts- must be expressed in other terms. The protective and guarantee-based approaches are not opposed to each other. The real opposition is between protective and punitive approaches, at one level of consideration, and between the approach based on guarantees and arbitrariness, at the other level.

Ultimately, where there seems to be contradiction a synthesis, a meeting-ground or consensus may arise dialectically. This would take up the substantive aspects of each doctrine; their intimate *raison d'être*, and would restore the original meaning of the word "protection" as one speaks of protection of the Law or protection of human rights, which has led some writers of treatises to identify it with juvenile offenders' Law, which under the sign of protection, in its original and pure meaning, would constitute a protective Law, not a Law that takes away fundamental rights.

On the one hand, this synthesis would retain the intention of protecting the child, as a person with specific needs for protection, who should be looked after with measures of this type, rather than with the characteristic solutions of the criminal system for adults.

This initial articulation of the synthesis has been reflected, extensively, in the American Convention itself, in the San Salvador Protocol, and in the Convention on the Rights of the Child, which insists on the specific conditions of minors and the respective protection measures, as well as in other instruments cited by the Advisory Opinion: Beijing Rules, Riyadh Guidelines, and Tokyo Rules (paragraphs 106-111). And on the other hand, the synthesis would include the basic demands of the guarantee-based approach: the rights and guarantees of minors. This second articulation is reflected, no less extensively, in those same international instruments, which express the current situation in this regard. In brief, the child will be treated in a specific manner, according to his or her own conditions, and will not be deprived since he or she is a subject of rights, not just an object of protection of the rights and guarantees inherent to human beings and to their specific conditions. Rather than suggesting that minors be included in the system for adults, or that their guarantees be diminished, on the one hand specificity is reinforced, and on the other hand lawfulness.

For this reason, in my view, the Advisory Opinion of the Inter-American Court avoids "subscribing" to one or another of the lines of thought involved, and prefers to analyze the issues raised before it conveniently grouped, as the decision itself states, under broad concepts that can be applied to the specific hypotheses-

and to state the respective opinions. In this manner, the Court, taking into account the inherent objectives of an opinion with these characteristics, fosters the development of domestic Law in accordance with the principles reflected in and applied by international law.

In the procedural system for minors, both when the procedure involves offenders who have broken the criminal law and when the procedure has been triggered by situations that are different in nature, it is necessary to respect the principles of fair trial in a democratic society, governed by legality and legitimacy of the acts of the authorities.

This involves equality between the parties, the right to be heard and to legal counsel, the possibility of submitting evidence and arguments, the presence of both parties, control over lawfulness, the right to appeal, etc. However, it is not possible to disregard the fact that minors have a special situation in the proceedings, as they do in life and in all social relations. Neither inferior nor superior: different, thus also requiring different attention. It must be underlined, as I did above and the Advisory Opinion is emphatic in this regard that all international instruments pertaining to the rights of the child or minor recognize without a doubt the “difference” between them and adults and the relevance, therefore, of adopting “special” measures with respect to children. The very idea of “speciality” recognizes and reaffirms the existing difference a *de facto* inequality, which the Law does not disregard and the diverse juridical solutions that it is appropriate to contribute given this panorama of diversity.

It is well known that in the social process not public, not private- equality among the parties is sought by ways other than the simple, solemn and ineffective proclamation that all men are equal before the law. It is necessary to introduce compensation factors to attain, insofar as possible, that leveling. This has been explicitly stated by the Inter- American Court itself in its case law, cited in this Advisory Opinion. (Paragraphs 47 and 97).

Proceedings involving minors in a major, rather than an incidental, manner to solve controversies and define their obligations and rights, coincide to a large extent with proceedings that are social in nature, origin, or orientation, and are distinct from those typically public, private, or criminal. The former require the “material” defense provided by the law and by judicial proceedings: specialized assistance, measures to correct material and procedural inequality, correction of deficiencies of the complaint, official aid to gather evidence offered by the parties, establishment of historical truth, etc.

An extreme form of the proceedings regarding juvenile offenders excluded parents and guardians from them. Said exclusion in this ambit dominated by what a distinguished procedural specialist called a proceeding of a “protective-inquisitorial nature” reflected the idea that there was no true controversy in trials of minors, because the interests of the minor and those of society coincided. Both sought the

welfare of the child. In current terms one would say: the best interests of the minor. If such was the theory, things did not function that way in concrete regulations and in practice, and in any case the rights of the parents regarding their children were at stake, as well as their own rights, those of the family and other rights. It is therefore necessary to accept that the minor cannot be foreign to his or her own trial, a witness and not a protagonist of his or her case, and that the parents or guardians also have their own rights to assert and for this reason they must participate in the trial, each with an advisor, promoter or defense counsel undertaking their defense fully and effectively.

This procedural claim should, on the other hand, note certain facts. In one case, the child is not qualified let us consider, especially, the youngest children to conduct a personal action such as that an experienced or at least a mature adult could conduct (paragraph 101). This characteristic of the child should be reflected in his or her participation in the trial and in the significance of the acts he or she carries out the statements, among other acts, whose requirements in terms of admissibility and efficacy are usually set forth in procedural law itself; can be ignored neither by the law nor by the courts, using as a pretext equality among all participants in the proceedings, as this would ultimately cause the greatest harm to the legal interests of the child. And in another case it is possible especially given the characteristics of the conflicts decided here that there is a contradiction of interests and even of positions between the parents and the minor. This is not always the appropriate terrain for legal representation, which in principle corresponds to those who exercise custody or guardianship, to be exercised to its fullest natural extent.

The above reflections regarding these and other similar hypotheses should not be construed as impediments for the State to act effectively and diligently and invariably with due respect for lawfulness in urgent situations that require immediate attention.

Grave danger faced by a person and, obviously, not only a minor- requires that the risk be addressed in a prompt and expedite manner. It would be absurd for a fire only to be turned out when there is a court order authorizing intervention in the private property on fire, or to protect an abandoned child, at risk of injury or death, only after a judicial process culminating with a written order by the competent authority.

The State has duties of immediate protection –set forth in legislation, in addition to reason and justice which it cannot disregard. In these hypotheses, the nature and function of the State as a “natural and necessary guarantor” of the goods of its citizens comes forth with all its strength, when all other entities called upon to ensure their safety the family, for example- are not able to ensure it or may, even, be a clear risk factor. This emergency action, which allows for no delay, is based on the same considerations that authorize adoption of preventive or

precautionary measures inspired by a reasonable appearance of urgent need, which suggests the existence of rights and duties, and by *periculum in mora*.

Of course, the precautionary measure does not prejudice the merits, nor does it defer or suppress the respective trial or proceeding.

I believe it necessary to highlight and I am pleased that OC17/2002 has done so a major issue for reflection on this matter, which is part of the background to understand where solutions to many of the problems not all, obviously that affect us in this regard are to be found. If one looks at the reality of minors taken before administrative or judicial authorities and then subject to protection measures in view of criminal offenses or other situations, one will note, in the vast majority of cases, that they lack integrated households, means of subsistence, true access to education and to healthcare, adequate recreation; in brief, they neither have nor ever had reasonable expectations and conditions for a decent life (paragraph 86). Generally it is they and not those better off who end up at police headquarters, with various charges, or who suffer violation of some of their most essential rights: life itself, as has been seen in the judicial experience of the Inter-American Court.

In these cases, which apply to an enormous number of children, not only are civil rights violated, including those pertaining to offenses or conduct that give rise to intervention by the abovementioned authorities, but also economic, social, and cultural rights. The “progressiveness” of the latter has not yet enabled coverage of millions and millions of human beings who, in their childhood, are far from having the necessities of life satisfied as those declarations and provisions pending fulfillment formally promise.

The Court has referred to this in the Villagrán Morales case, cited in the instant Advisory Opinion (paragraph 80), when it puts forth concepts that will provide new paths for jurisprudence and it establishes that the right of children to life involves not only respect for prohibitions regarding deprivation of life, set forth in article 4 of the American Convention, but also providing suitable living conditions to promote the development of minors.

In this regard, the unified idea of human rights becomes relevant: all of them significant, enforceable, mutually complementary and conditioned. It is good for proceedings to be organized in such a way that the children have all the means required by due legal process for assistance and defense, and it is also good for children not to be removed from the family milieu if they have one without justification, but none of this amounts to a release from the obligation to construct circumstances that allow minors to adequately develop their existence, throughout the horizon of each human life, and not only in situations that should be exceptional in which certain minors face “problems with the law.” They are all, simultaneously, the protective shield of the human being: they are mutually enforced, conditioned, and perfected, and it is therefore necessary to pay equal attention to all of them. We could not say that human dignity is safe where there is,

perhaps, care for civil and political rights or only some of them, among the most visible ones and attention is not paid to other rights.

In my view, OC17 rightly addresses this matter from a dual perspective. On the one hand it underlines the obligation of the States, which as regards the Americas was set forth in the Bogotá Charter pursuant to the Buenos Aires Protocol, to adopt measures that will enable people's various necessities of life to be satisfied; and on the other hand it recognizes that true rights are involved, the enforceability of which, as such, begins to gain ground. In effect, it would not suffice to attribute duties to the States if the rights of individuals are not in turn recognized: the characteristic bilateralism of the juridical system thus takes shape. In this regard, there has been a conceptual evolution similar to that prevailing in the domestic system: if Constitutions have a normative nature, as is now proclaimed they are, in this sense, genuine "supreme law," "law of laws", this is also the nature of treaties, and as such they ascribe true obligations and authentic rights.

The latter include, as regards the theme I address here, the economic, social, and cultural rights of children.

For the appellant:

Information not available

For the respondent:

Information not available

CAESAR V TRINIDAD AND TOBAGO

INTER-AMERICAN COURT OF HUMAN RIGHTS

INTER-AM CT HR (SER C) NUMBER 123 [2005]

[1] *Corporal punishment – Whether cruel inhuman and degrading punishment in international human rights law.*

[2] *Inter-American Court of Human Rights – Jurisdiction – Ratione Temporis – Non-participation of party to proceedings.*

[3] *Violation of international law – Duty to pay reparations – Kinds of reparations payable – Enforcement of order.*

Editor's Summary

The case was submitted to the Court by the Inter-American Commission on Human Rights against the State of Trinidad and Tobago. The Commission filed the application pursuant to article 61 of the American Convention, for the Court to decide whether the State violated “Mr [Winston] Caesar’s right to humane treatment under articles 5(1) and 5(2) of the Convention, his right to be tried within a reasonable time under article 8(1) of the Convention, and his right to judicial protection under article 25 of the Convention, all in conjunction with violations of article 1(1) of the Convention. In addition, the Commission argue[d] that the State, by failing to provide for the right to be tried within a reasonable time under its domestic law and by authorizing a form of punishment that is incompatible with the right to humane treatment, is responsible for violating its obligation under article 2 of the Convention to give domestic legal effect to the rights guaranteed under articles 5(1), 5(2), 7(5) and 8(1) of the Convention”. The Commission also requested that the Court order the State to adopt various pecuniary and non-pecuniary measures of reparation. According to the Application of the Commission, the legislation of Trinidad and Tobago allowed for the imposition of corporal punishment. Under the Corporal Punishment Act (Offenders Over Sixteen) of 1953 (hereinafter “Corporal Punishment Act”), a court was authorized to order any male offender above the age of sixteen years to be struck, or flogged, with an object called a “cat-o-nine tails”, in addition to any other punishment to which he was liable, when convicted of certain crimes. That same law provided that a sentence of flogging was to be carried out as soon as may be practicable and in no case after the expiration of six months from the passing of the decision. The alleged victim in this case, Mr Winston Caesar, was convicted before the High Court of Trinidad and Tobago of the offense of attempted rape and was sentenced to serve 20 years in a penitentiary with hard labour and to receive 15 strokes of the “cat-o-nine tails”. The Court of Appeal of Trinidad and

Tobago confirmed his conviction and sentence and, 23 months after the final confirmation of his sentence, Mr Caesar's punishment of flogging was carried out. Moreover, the Commission contended that, given the nature of the violations for which the State should be held responsible, Trinidad and Tobago must provide Mr Caesar with an effective remedy, which included compensation for the moral damage suffered by him. In addition, the Commission seeks an order requiring the State to adopt legislative and other measures as necessary to give effect to the right to a trial within a reasonable time, to abrogate the punishment of flogging as provided under its Corporal Punishment Act, and to ensure that conditions of detention in the State's prisons satisfy the minimum standards of humane treatment provided for under the Convention.

Held - The Court cannot exercise its contentious jurisdiction to apply the Convention and declare that its provisions have been violated when the alleged facts or the conduct of the defendant State which might involve international responsibility precede recognition of the Court's jurisdiction. However, in case of a continuing or permanent violation, whose commencement occurred before the defendant State had recognized the Court's contentious jurisdiction and which persists even after this recognition, the Court is competent to consider the actions and omissions that occurred after the recognition of its jurisdiction and the effects of the violations.

When a State does not specifically contest the application, the facts on which it remains silent are presumed to be true, provided that the evidence before the Court is found to be consistent with those facts.

International jurisprudence has recognized that the absence of one of the parties at any stage of the case, does not affect the validity of the judgment.

The Court is authorized to consider as established those facts that have not been expressly denied and those claims that have not been expressly contested; nevertheless, as master of its own jurisdiction and in exercise of the authority granted by article 55 of the Rules of Procedure, the Court is at liberty to assess the facts, alone or in conjunction with other elements from the evidence available.

A State's inactivity before an international human rights tribunal not only may eventually work to its detriment but is contrary to the object, purpose and spirit of the American Convention and of the collective enforcement mechanism enshrined therein.

It is well-settled law and practice that international procedures relating to the admission and evaluation of evidence are not subject to the same formalities as domestic judicial procedures. This principle is especially applicable to international human rights tribunals, which enjoy greater flexibility in assessing the evidence presented before them, in accordance with the rules of logic and on the basis of

experience. The admission of evidence must be carried out with careful attention to the circumstances of the particular case, while bearing in mind the limits imposed by due respect for judicial certainty and procedural equality as between the parties.

Torture and cruel, inhuman or degrading punishment or treatment are strictly prohibited by international human rights law. The prohibition of torture and cruel, inhuman or degrading punishment or treatment is absolute and non-derogable, even under the most difficult circumstances, such as war, threat of war, the fight against terrorism and any other crimes, martial law or a state of emergency, civil commotion or conflict, suspension of constitutional guarantees, internal political instability or other public emergencies or catastrophes.

There is the growing trend towards recognition, at international and domestic levels, of the impermissible character of corporal punishment, with regard to its inherently cruel, inhuman and degrading nature.

While the Inter-American Court is neither authorized nor required by the Convention to pronounce on the compatibility of the actions of individuals with the Convention, it is nevertheless obvious that the conduct and decisions of civil servants and state agents must be framed within those international obligations.

The State violated article 5(1) and 5(2), in connection with article 1(1), of the Convention, to the detriment of Mr Winston Caesar.

All persons deprived of their liberty have the right to detention conditions that are compatible with their human dignity. Detention in conditions of overcrowding, with lack of ventilation and natural light, without a bed for rest and adequate sanitary conditions, in isolation or with undue restrictions upon the visiting schedule, constitute a violation of the right to humane treatment.

An illicit act is imputed to the state, there immediately arises a responsibility on the part of that state for the breach of the international norm involved, together with the subsequent duty to make reparations and put an end to the consequences of said violation.

The reparation of harm caused by a violation of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which consists in restoring the situation that existed before the violation occurred. When this is not possible, it is the task of the Tribunal to order the adoption of a series of measures that, in addition to guaranteeing respect for the rights violated, will ensure that the damage resulting from the infractions is repaired, by way, *inter alia*, of payment of an indemnity as compensation for the harm caused. The obligation to make reparations, which is regulated in all its aspects (scope, nature, modalities, and designation of beneficiaries) by international law, cannot be altered or eluded by the State's invocation of provisions of its domestic law.

The nature and amount of the reparations depend on the harm caused at both the material and moral levels.

Moral damage may include suffering and affliction caused to the direct victims and their next of kin, detriment to very significant personal values, as well as nonpecuniary alterations in the conditions of existence of a victim or his or her family. Since it is not possible to assign a precise monetary equivalent to non-pecuniary damage, for purposes of comprehensive reparation to victims, the Court must turn to other alternatives: first, payment of an amount of money or delivery of goods or services that can be estimated in monetary terms, which the Court will establish through reasonable application of judicial discretion and equity; and second, acts or works which are public in their scope or effects, commitment to efforts seeking to avoid the repetition of violations, as well as recognition of the victim's dignity.

Cases referred to in judgment

("A" means adopted; "AL" means allowed; "AP" means applied; "APP" means approved; "C" means considered; "D" means distinguished; "DA" means disapproved; "DT" means doubted; "E" means explained; "F" means followed; "O" means overruled)

United Kingdom

Tyrer v United Kingdom

Others

Barrios Altos [2001]

Belilos v Switzerland [1988]

Blake v Guatemala [1999]

Bulacio v Argentina [2003]

Caesar v Trinidad and Tobago

Gómez Paquiyauri v Peru

Greek [1967– 1970]

Hobbs et al v R

I Gueye et alii v France [1989]

Ireland v United Kingdom [1971–1978]

James et alii v Trinidad and Tobago

König [1978]

Le Compte [1981 and 1983]

Loayza Tamayo v Perú

Loizidou v Turkey [1995]

Matthew v The State of Trinidad and Tobago

Osbourne v Jamaica

Ringelsen [1971]

*Sooklal v Trinidad and Tobago**Tibi v Ecuador**Van Duzen v Canada**Villagrán Morales and others v Guatemala, Merits*, [1999]

Judgment

GARCÍA-RAMÍREZ P, ABREU-BURELLI VP, OLIVER JACKMAN, CANÇADO-TRINDADE, MEDINA-QUIROGA, VENTURA-ROBLES AND GARCÍA-SAYÁN J, SAAVEDRA-ALESSANDRI SECRETARY; AND SEGARES-RODRÍGUEZ, DEPUTY SECRETARY:

1. INTRODUCTION OF THE CASE

The present case was submitted to the Court by the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the Inter-American Commission”) against the State of Trinidad and Tobago (hereinafter “the State” or “Trinidad and Tobago”) on 26 February 2003, originating from the petition number 12.147, which was received at the Commission's Secretariat on 13 May 1999.

The Commission filed the application pursuant to article 61 of the American Convention, for the Court to decide whether the State violated “Mr Winston Caesar’s right to humane treatment under articles 5(1) and 5(2) of the Convention, his right to be tried within a reasonable time under article 8(1) of the Convention, and his right to judicial protection under article 25 of the Convention, all in conjunction with violations of article 1(1) of the Convention. In addition, the Commission argue[d] that the State, by failing to provide for the right to be tried within a reasonable time under its domestic law and by authorizing a form of punishment that is incompatible with the right to humane treatment, is responsible for violating its obligation... under article 2 of the Convention to give domestic legal effect... to the rights guaranteed under articles 5(1), 5(2), 7(5) and 8(1) of the Convention”. The Commission also requested that the Court order the State to adopt various pecuniary and non-pecuniary measures of reparation.

According to the application of the Commission, the current legislation of Trinidad and Tobago allows for the imposition of corporal punishment. Under the Corporal Punishment Act (Offenders Over Sixteen) of 1953 (hereinafter “Corporal Punishment Act”), a court may order any male offender above the age of sixteen years to be struck, or flogged, with an object called a “cat-o-nine tails”, in addition to any other punishment to which he is liable, when convicted of certain crimes. That same law provides that a sentence of flogging shall be carried out as soon as may be practicable and in no case after the expiration of six months from the passing of the decision. The alleged victim in this case, Mr Winston Caesar

(hereinafter “Mr Caesar” or “the alleged victim”), was convicted before the High Court of Trinidad and Tobago of the offense of attempted rape and was sentenced to serve 20 years in a penitentiary with hard labour and to receive 15 strokes of the “*cat-o-nine tails*”. The Court of Appeal of Trinidad and Tobago confirmed his conviction and sentence and, 23 months after the final confirmation of his sentence, Mr Caesar’s punishment of flogging was carried out.

Moreover, the Commission contends that, given the nature of the violations for which the State should be held responsible, Trinidad and Tobago must provide Mr Caesar with an effective remedy, which includes compensation for the moral damage suffered by him. In addition, the Commission seeks an order requiring the State to adopt legislative and other measures as necessary to give effect to the right to a trial within a reasonable time, to abrogate the punishment of flogging as provided under its Corporal Punishment Act, and to ensure that conditions of detention in the State’s prisons satisfy the minimum standards of humane treatment provided for under the Convention.

2. JURISDICTION OF THE COURT

Trinidad and Tobago deposited its instrument of ratification of the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”) on 28 May 1991. On that same day, the State recognised the compulsory jurisdiction of the Court.

On 26 May 1998, Trinidad and Tobago denounced the Convention and the denunciation became effective one year later, as of 26 May 1999, pursuant to article 78 of the Convention. According to article 78 of the Convention, a denunciation will not release the denouncing State from its obligations under the Convention with respect to acts of that State occurring prior to the effective date of the denunciation that may constitute a violation of the Convention.

Moreover, in the *Hilaire, Constantine, Benjamin* and other cases, the Court held in its judgments on preliminary objections that: ... Trinidad and Tobago cannot prevail in the limitation included in its instrument of acceptance of the optional clause of the mandatory jurisdiction of the Inter-American Court of Human Rights in virtue of what has been established in article 62 of the American Convention, because this limitation is incompatible with the object and purpose of the Convention.

Notwithstanding the fact that the Inter-American Court is fully competent to hear the present case, the State did not participate in the proceedings before this Tribunal (*infra* paragraphs 24, 30, 34 and 39). Nevertheless, the Court, as is the case with any other international organ with jurisdictional functions, has the

inherent authority to determine the scope of its own competence (*compétence de la compétence*).

In interpreting the American Convention in accordance with the general rules of treaty interpretation enshrined in article 31(1) of the Vienna Convention on the Law of Treaties, bearing in mind the object and purpose of the American Convention, this Tribunal, in the exercise of the authority conferred on it by article 62(3) of the American Convention, must act in a manner that preserves the integrity of the provisions of article 62(1) of the Convention. It would be unacceptable to subordinate these provisions to restrictions that would render inoperative the Court's jurisdictional role, and consequently, the human rights protection system established in the Convention.

Furthermore, the Court considers relevant to recall a recent case law with respect to the its *ratione temporis* competence:

"... The Court cannot exercise its contentious jurisdiction to apply the Convention and declare that its provisions have been violated when the alleged facts or the conduct of the defendant State which might involve international responsibility precede recognition of the Court's jurisdiction.

... However, in case of a continuing or permanent violation, whose commencement occurred before the defendant State had recognized the Court's contentious jurisdiction and which persists even after this recognition, the Court is competent to consider the actions and omissions that occurred after the recognition of its jurisdiction and the effects of the violations."

With the exception of certain matters concerning the criminal proceedings, most of the facts alleged in the application in the present case occurred before the State's denunciation of the Convention came into effect. Taking into account the considerations set out in the preceding paragraphs, the Court reaffirms its competence, according to the terms of articles 62(3) and 78(2) of the Convention, to hear the present case and render judgment.

3. PROCEEDINGS BEFORE THE COMMISSION

(a) Proceedings Before the Court

(i) Previous Considerations

The State did not appear in the proceedings before the Commission nor before the Court. Nevertheless, the Court has, of its own motion, taken the necessary measures to complete consideration of the case and, having evaluated the arguments and the evidence tendered during the proceedings by the Inter-American Commission and by the representatives, now delivers its judgment.

In its final written arguments the Commission invoked article 38(2) of the Court's Rules of Procedure, and the Court deems it pertinent to examine the scope and effect of its relevance to the circumstances of the present case.

Article 38(2) of the Rules of Procedure provides: In its answer, the respondent must state whether it accepts the facts and claims or whether it contradicts them, and the Court may consider accepted those facts that have not been expressly denied and the claims that have not been expressly contested.

The Court has held in previous cases that when a State does not specifically contest the Application, the facts on which it remains silent are presumed to be true, provided that the evidence before the Court is found to be consistent with those facts. In recent cases in which the State has presented no defense and has failed to appear at the hearings, the Court has ruled:

"... that procedural inactivity does not give rise to a specific sanction against the parties, nor does it affect the development of the proceeding; but, it may eventually prejudice them, if they take the decision not to exercise fully their right to defense or to execute the appropriate procedural actions that are in their interests, in accordance with the *audi alteram partem* principle.

... International jurisprudence has recognized that the absence of one of the parties at any stage of the case, does not affect the validity of the judgment; therefore, pursuant to article 68(1) of the Convention, Peru's obligation to comply with this Court's judgment in this case is in force."

Pursuant to article 38(2) of the Rules of Procedure, the Court is authorized to consider as established those facts that have not been expressly denied and those claims that have not been expressly contested; nevertheless, as master of its own jurisdiction (*supra* paragraphs 8 and 11) and in exercise of the authority granted by article 55 of the Rules of Procedure, the Court is at liberty to assess the facts, alone or in conjunction with other elements from the evidence available. It remains the case that the State's inactivity before an international human rights tribunal not only may eventually work to its detriment but is contrary to the object, purpose and spirit of the American Convention and of the collective enforcement mechanism enshrined therein.

It should be emphasized that in this case the State failed to discharge its procedural responsibility to submit evidence in the course of the procedural stages set out in article 44 of the Rules of Procedure (*supra* paragraph 24). In consequence, the Court deems it appropriate to establish the proven facts of the instant case, taking into account, in addition to the aforementioned silence of the State, other elements that may assist it in establishing the truth of the facts, exercising its responsibility to protect human rights and applying, to this end, the pertinent provisions of the American Convention and of general international law.

6. EVIDENCE

It is well-settled law and practice that international procedures relating to the admission and evaluation of evidence are not subject to the same formalities as domestic judicial procedures. This principle is especially applicable to international human rights tribunals, which enjoy greater flexibility in assessing the evidence presented before them, in accordance with the rules of logic and on the basis of experience. The admission of evidence must be carried out with careful attention to the circumstances of the particular case, while bearing in mind the limits imposed by due respect for judicial certainty and procedural equality as between the parties...

7. DOCUMENTARY EVIDENCE

Among the documentary evidence presented by the parties, the Commission submitted the alleged victim's declaration and the reports and exhibits of the expert witnesses (affidavits) pursuant to the President's Order of 20 October 2004 (*supra* paragraph 27). The Court deems pertinent to summarize these affidavits.

(a) Testimony of Mr Winston Caesar

(i) Expert Evidence

During the public hearing (*supra* paragraph 29), the Court heard oral expert testimony from Dr Ferris proposed by the Inter-American Commission. His testimony and affidavit are summarized in the previous section of this chapter (*supra* paragraph 44d).

(ii) Assessment of the Evidence

In this case, as in others, the Court admits the probative value of those documents presented in timely fashion by the parties, the authenticity of which was not challenged or questioned.

7. PROVEN FACTS

- 49(1) The Court considers that the following facts have been proven: Regarding Winston Caesar's criminal proceedings 49(1). On 11 November 1983, Mr Winston Caesar was initially arrested as the suspect in connection with a rape that was alleged to have taken place in Trinidad on 8 November 1983. On 16 November 1983, he was released on bail. Between 1985 and 1986 committal proceedings took place in the Port of Spain Magistrate's 4th Court, which ordered him to stand trial on 21 February 1986.

- 49(2) On 10 September 1991, he was arrested and taken into custody for failing to appear in court. During his trial he was held at Port of Spain prison.
- 49(3) The trial was held in January 1992, before Mr Justice Dayalsingh, in the High Court of Trinidad and Tobago. On 10 January 1992, Mr Caesar was convicted of attempted rape under Trinidad and Tobago's Offences Against the Person Act. He was sentenced to serve 20 years in a penitentiary with hard labor and to receive 15 strokes of the cat-o-nine tails. That same day Mr Caesar signed a Notice of Appeal and remained in detention.
- 49(4) On 26 November 1993 Mr Caesar's attorney filed an application for leave to appeal at the Court of Appeal of Trinidad and Tobago, challenging the legal basis for the ruling. On 28 February 1996, the Court of Appeal of Trinidad and Tobago dismissed Mr Caesar's application for leave to appeal apparently without giving reasons, and confirmed the conviction and sentence.
- 49(5) ...

Regarding the relevant law in Trinidad and Tobago

- 49(6) There are two principal laws that authorize the use of corporal punishment in Trinidad and Tobago. One of them is the Corporal Punishment Act (Offenders Over Eighteen). The terms of this legislation provide for the application of corporal punishment for certain crimes by, *inter alia*, the following methods: whipping with a rod of tamarind or similar switch and flogging with strokes of an object called a "cat-o-nine tails".
- 49(7) ...
- 49(12) The Constitution of Trinidad and Tobago does not provide, among its prescribed fundamental rights and freedoms, the right to a trial within a reasonable time.

Regarding Mr Caesar's detention and health conditions.

- 49(13) Mr Caesar has been incarcerated since 10 September 1991 (*supra* paragraph 49(2)) and has served 13 years of his 20-year sentence.
- 49(14) The prison system in Trinidad and Tobago consists of the following five prisons:
Port of Spain Prison, Golden Grove Prison, Maximum Security Prison, Carrera Convict Prison and Tobago Prison.
- 49(15) During the course of his criminal proceedings, Mr Caesar has been incarcerated at four of the five prisons in Trinidad and Tobago. After his arrest in 1991, he was held for a short time at the Port of Spain Prison, and he was then transferred to the Golden Grove Prison in Arouca, where he stayed for at least two months. Then he was returned to the Port of Spain Prison for two months. Subsequently, Mr Caesar was sent back again to

the Golden Grove Prison, where he remained until his trial in February 1996 when he was transferred to the Port of Spain Prison. Some time after, he was transferred to the Golden Grove Prison once again. After his case was dismissed by the Court of Appeal, he was returned to the Port of Spain Prison, where he was held for at least two months. He was then sent to the Carrera Convict Prison, where he was detained until November 1999.

Finally, he was transferred to the Maximum Security Prison, where he remains to date.

49(16) ...

49(19) Mr Caesar did not receive timely treatment with respect to his haemorrhoid condition. In 1992 a doctor recommended that he undergo surgery for his hemorrhoids.

The procedure was postponed at least twice and, during the delay, his condition worsened. The surgery finally took place at the end of January 1997. At the present time he continues to suffer and bleed heavily because of this condition.

49(20) ...

Regarding Mr Caesar's Corporal Punishment.

49(23) Between April and June of 1996, Mr Caesar was taken to the Carrera Convict Prison.

49(24) Prisoners who are sentenced to corporal punishment are usually held beforehand in the Carrera Convict Prison, with the purpose of executing the sentence. Corporal punishment is carried out in this prison only at specified times during the year.

49(25) ...

49(26) On February 5, 1998, Mr Caesar was subjected to 15 strokes of the “cat-o-nine tails”, in accordance with his sentence.

49(27) ...

49(29) There are no medical records regarding the administration of Mr Caesar's corporal punishment.

Physical and psychological consequences of Mr Caesar's corporal punishment

49(30) Mr Caesar remained in the infirmary for two months after the corporal punishment, and did not receive any medical treatment for the flogging except for orally administered painkillers. Mr Caesar continues to suffer pain in his shoulders.

49(31) As a result of the punishment, Mr Caesar has suffered depression, and acute anxiety of sufficient severity to warrant a diagnosis of, at a minimum, an adjustment disorder.

49(32) ...

Regarding Mr Caesar's damages.

49(33) The facts of the present case have resulted in the alteration of Mr Caesar's physical and psychological condition, causing him damages.

8. ARTICLES 5(1) AND 5(2) OF THE AMERICAN CONVENTION IN CONJUNCTION WITH ARTICLES 1.1 AND 2 OF THE CONVENTION (RIGHT TO PERSONAL INTEGRITY)

(1) Arguments of the Commission

(2) Arguments of the Representatives

(3) The Court's Assessment

(a) Article 5(1) and 5(2) of the Convention provide...

(b) Article 1(1) of the American Convention stipulates...

(c) Article 2 of the American Convention provides...

(d) In this section the Court will address the following issues under article 5(1) and 5(2), in relation to articles 1(1) and 2, of the Convention:

(i) the lawfulness of the State's imposition of the corporal punishment of flogging under said provisions and the manner in which the judicial corporal punishment was inflicted upon Mr Caesar;

(ii) whether the State has failed to comply with its general obligation under article 2 of the Convention to give domestic legal effect to the rights protected under article 5; and

(iii) whether Mr Caesar's conditions of detention amounted to a violation of said provisions on the part of the State.

Regarding the lawfulness of the State's imposition of the corporal punishment of flogging under article 5(1) and 5(2), in conjunction with article 1(1), of the Convention, and the manner in which the judicial corporal punishment was inflicted upon Mr Caesar.

The Commission submitted that the form of punishment to which Mr Caesar was subjected, is "by its nature, intention and effects [inherently] inconsistent with the [minimum] standards of humane treatment under articles 5(1) and 5(2) of the American Convention".

To judge whether the State violated article 5(1) and 5(2) of the American Convention in the instant case, the Court must first decide upon the compatibility of a state's imposition of corporal punishment, specifically by flogging, with regard to said provision. To this end, the Court deems it pertinent to offer an overview of this punishment under international and domestic law and practice.

Every international human rights instrument of general scope, whether regional or universal, contains provisions similar in content to article 5 of the American Convention 14 These general provisions are complemented by the express prohibition of torture and other cruel, inhuman or degrading treatment or punishment in particular international instruments and, of relevance to the instant case, the prohibition of the use of corporal punishment 15.

The Inter-American Court has held that ... torture and cruel, inhuman or degrading punishment or treatment are strictly prohibited by international human rights law. The prohibition of torture and cruel, inhuman or degrading punishment or treatment is absolute and non-derogable, even under the most difficult circumstances, such as war, threat of war, the fight against terrorism and any other crimes, martial law or a state of emergency, civil commotion or conflict, suspension of constitutional guarantees, internal political instability or other public emergencies or catastrophes.

In particular, international case law and the following authorities have considered that corporal punishment is incompatible with international guarantees against torture and other cruel, inhuman or degrading treatment.

The United Nations Special Rapporteur on Torture has stated that article 31 of the United Nations Standard Minimum Rules for the Treatment of Prisoners reflects the international prohibition of cruel, inhuman or degrading treatment, and, more broadly, that “corporal punishment is inconsistent with the prohibition against torture, and cruel, inhuman or degrading treatment or punishment enshrined, *inter alia*, in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Declaration on the Protection of All Persons from Being Subjected to Torture, Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention against Torture, Cruel, Inhuman or Degrading Treatment or Punishment”.

Similarly, the United Nations Human Rights Committee has concluded that the prohibition of torture and cruel, inhuman or degrading treatment or punishment contained in article 7 of the International Covenant on Civil and Political Rights should be extended to corporal punishment, “including excessive chastisement ordered as punishment for a crime, or as an educative or disciplinary measure”. With respect to the use of corporal punishment in Trinidad and Tobago, the Committee specified in its Concluding Observations on a report submitted by Trinidad and Tobago under article 40 of the Covenant that it was “disturbed to learn that apart from prohibiting corporal punishment for persons under 18 years of

age, the State party is still practicing the punishment of flogging and whipping which are cruel and inhuman punishment prohibited by article 7.” It thus recommended that the State immediately abolish all sentences of flogging or whipping.

The Human Rights Committee has reached similar conclusions in its decisions on individual complaints. For example, in the case of *Sooklal v Trinidad and Tobago*, the Committee ruled that the administration of birching provided for by the law of the State as a sanction constitutes cruel, inhuman or degrading treatment or punishment contrary to article 7 of the Covenant. Similarly, in the case *Osbourne v Jamaica*, the Committee found that by carrying out a sentence of whipping with a tamarind switch, the State party had breached its obligations under said provision. 20 In that ruling the Committee stated that:

“[i]rrespective of the nature of the crime that is to be punished, however brutal it may be, it is the firm opinion of the Committee that corporal punishment constitutes cruel, inhuman and degrading treatment or punishment contrary to article 7 of the Covenant.”

In the case of *Tyrer v United Kingdom*, the European Court of Human Rights addressed the incompatibility of corporal punishment with the right to humane treatment under article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In the case of a minor who had been subjected to three strokes of the birch pursuant to domestic legislation in the Isle of Man (United Kingdom), the Court concluded that the treatment was degrading and as such violated article 3 of the European Convention. The European Court held that: [t]he very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutionalised violence, that is in the present case violence permitted by the law, ordered by the judicial authorities of the State and carried out by the police authorities of the State ... Thus, although the applicant did not suffer any severe or long-lasting physical effects, his punishment – whereby he was treated as an object in the power of the authorities – constituted an assault on precisely that which it is one of the main purposes of article 3 (article 3) to protect, namely a person's dignity and physical integrity. Neither can it be excluded that the punishment may have had adverse psychological effects. The institutionalized character of this violence is further compounded by the whole aura of official procedure attending the punishment and by the fact that those inflicting it were total strangers to the offender.

Furthermore, norms of international humanitarian law absolutely prohibit the use of corporal punishment in situations of armed conflict, as well as in times of peace.

It should be noted that a number of those States that still retained corporal punishment have recently abolished it. Moreover, an increasing number of

domestic courts have concluded that the imposition of corporal punishment, regardless of the circumstances of the case and the modalities through which it is carried out, constitutes cruel, inhuman and degrading treatment, and represents a form of punishment no longer acceptable in a democratic society.

The European Court of Human Rights has held that a treatment must attain a minimum level of severity in order to be considered inhuman or degrading and, in the extreme, torture. The evaluation of this minimum level is relative and depends on the circumstances of each case, such as the duration of the treatment, and its physical and mental effects.

Furthermore, in the *Celebici* case the Trial chamber of the International Criminal Tribunal for the Former Yugoslavia analyzed international humanitarian law and human rights law standards, on the basis of which it defined inhuman or cruel treatment as: ... an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, that causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.

For its part, the Inter-American Court has, since the case of *Loayza Tamayo v Perú*, held that: [t]he violation of the right to physical and psychological integrity of persons is a category of violation that has several gradations and embraces treatment ranging from torture to other types of humiliation or cruel, inhuman or degrading treatment with varying degrees of physical and psychological effects caused by endogenous and exogenous factors which must be proven in each specific situation. The European Court of Human Rights has declared that, even in the absence of physical injuries, psychological and moral suffering, accompanied by psychic disturbance during questioning, may be deemed inhuman treatment. The degrading aspect is characterized by the fear, anxiety and inferiority induced for the purpose of humiliating and degrading the victim and breaking his physical and moral resistance.

The abovementioned international instruments and its own case law lead the Court to conclude that there is a universal prohibition of torture and other cruel, inhuman or degrading treatment or punishment, independent of any codification or declaration, since all these practices constitute a violation of peremptory norms of international law. The Court also notes the growing trend towards recognition, at international and domestic levels, of the impermissible character of corporal punishment, with regard to its inherently cruel, inhuman and degrading nature. In consequence, a State Party to the American Convention, in compliance with its obligations arising from articles 1(1), 5(1) and 5(2) of that instrument, is under an obligation *erga omnes* to abstain from imposing corporal punishment, as well as to prevent its administration, for constituting, in any circumstance, a cruel, inhuman or degrading treatment or punishment.

In the instant case, Mr Caesar was subjected to corporal punishment by flogging, pursuant to a sentence delivered by the High Court of Trinidad and

Tobago, according to the terms of Trinidad and Tobago's Corporal Punishment Act. This law authorizes domestic courts to order the application of sentences of corporal punishment for certain crimes, for any male offender, in addition to any other punishment for which he is liable, whether by flogging with a "cat-o-nine tails" or by whipping with a tamarind rod, birch or other switches, "or in either case such other instruments as the President may from time to time approve" (*supra* paragraph 49(7)).

According to the evidence presented to the Court, the "cat-o-nine tails" consists of a plaited rope instrument made up of nine knotted thongs of cotton cord, 30 inches long and less than one quarter of an inch in diameter, attached to a handle, which are lashed across the back of the subject, between the shoulders and the lower area of the spine (*supra* paragraph 49(8)). The instrument is designed to bruise and lacerate the skin of the subject and is also intended to cause severe physical and psychological suffering. As such, the Court is convinced that the cat-o-nine tails, as regulated and used in Trinidad and Tobago for the administration of corporal punishment by flogging, is used to inflict a cruel, inhuman and degrading form of punishment.

Regarding the law and practice in Trinidad and Tobago of judicial corporal punishment by flogging, the Court considers that the very nature of this punishment reflects an institutionalization of violence, which, although permitted by the law, ordered by the State's judges and carried out by its prison authorities, is a sanction incompatible with the Convention. As such, corporal punishment by flogging constitutes a form of torture and, therefore, is a violation per se of the right of any person submitted to such punishment to have his physical, mental and moral integrity respected, as provided in article 5(1) and 5(2), in connection with article 1(1) of the Convention. Accordingly, Trinidad and Tobago's Corporal Punishment Act must be considered in contravention to article 5(1) and 5(2) of the Convention (*infra* paragraph 94).

While the Inter-American Court is neither authorized nor required by the Convention to pronounce on the compatibility of the actions of individuals with the Convention, it is nevertheless obvious that the conduct and decisions of civil servants and state agents must be framed within those international obligations. In the instant case, where the Corporal Punishment Act of Trinidad and Tobago gives the relevant judicial officer an option to order corporal punishment in addition to imprisonment in certain circumstances, the Court feels bound to put on record its profound regret that the presiding officer in the State's High Court saw fit to exercise an option which would manifestly have the effect of inflicting a punishment that is not merely in blatant violation of the State's international obligations under the Convention, but also is universally stigmatized as cruel, inhuman, and degrading.

The Court will now examine the particular circumstances in which Mr Caesar's sentence of corporal punishment was carried out.

It is established that State agents flogged Mr Caesar with a "cat-o-nine tails" on 5 February 1998. Mr Caesar's affidavit leaves little to the imagination concerning the physical and emotional impact of this punishment, as well as the anguish and suffering he experienced in the moments immediately preceding the punishment. He described the experience as follows...

Moreover, the Court shares the Commission's view that the sentence was carried out in a manner that severely humiliated Mr Caesar. He was forced to lie "spread-eagled and naked" on a metal contraption before at least six persons, completely immobilized, while the strokes were delivered.

In keeping with domestic regulations and practice, the prison doctor was present before and during the alleged victim's flogging to advise on the prisoner's physical condition, and to decide whether the punishment could be safely carried out. The representatives alleged that, by authorizing the flogging despite his knowledge of Mr Caesar's medical condition, the prison doctor acted in violation of his ethical duty. The Commission argued that such circumstances raise serious questions as to whether the medical personnel in the State's prisons comply with international standards governing the conduct of health personnel, in particular those set forth in the United Nations' Principles of Medical Ethics Relevant to the Role of Health Personnel in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading treatment or Punishment.

As noted above, the Court does not assess individual responsibilities; its function is rather to protect the victims, determine when their rights have been violated and order reparation for the damage caused by the State responsible for such acts.

The Commission also argued that the evidence presented confirms that the suffering experienced by Mr Caesar was also exacerbated by his own vulnerable medical condition, specifically owing to his surgery for hemorrhoids only weeks before the flogging. The alleged victim himself affirmed this situation in his affidavit. However, the representatives stated during the public hearing that the date alleged as the day of the surgery may have been incorrect.

It was proven that the alleged victim developed hemorrhoids during his detention and, as a result, underwent surgery in January 1997 (*supra* paragraph 49(19)).

Since there is no showing that the abovementioned surgery occurred a few weeks before the flogging, there are no grounds for finding aggravating circumstances in this context.

It is established that, after the flogging, the only medical treatment provided by the State consisted of painkillers, notwithstanding the fact that he had been injured

and that his medical condition was already precarious. This conclusion is supported by Robert Ferris' statement that he found no medical records of any kind relating to the corporal punishment, its effects on Mr Caesar or any treatment provided (*supra* paragraph 49(29)).

The Commission further argued that, since the punishment was carried out 23 months after the alleged victim's sentencing, it was in flagrant violation of the State's own domestic law, as well as contrary to article 5(1) and 5(2) of the Convention.

The Court notes that section 6 of the Corporal Punishment Act of Trinidad and Tobago requires a sentence of corporal punishment to be carried out within six months from the date of sentencing. As shown above, the 1994 amendment to the Corporal Punishment Act provided that any period of appeal would not count in reckoning the statutory limit of six months (*supra* paragraph 49(9)). This amendment, however, was not applicable to Mr Caesar's situation, since he was sentenced prior to its entry into force.

In any event, the flogging was performed some five years and seven months outside the statutory limit, so that it can be reasonably assumed that the delay both augmented and extended his mental anguish.

The Court, thus, has endeavored to assess all of the aggravating circumstances which arose in the infliction of Mr Caesar's punishment and has taken into account the degree of intensity of physical and mental pain suffered by him, which was in turn exacerbated by the treatment he received before and after the flogging. In that regard, the Commission argued that there has been an additional violation of the Convention in relation to those aggravating circumstances.

In all the circumstances, therefore, the Court finds that the State violated article 5(1) and 5(2), in connection with article 1(1), of the Convention, to the detriment of Mr Winston Caesar.

On whether the State has failed to comply with its general obligation under article 2 of the Convention to give domestic legal effect to the rights protected under article 5 of said Convention.

The Court now will assess whether the State has fulfilled its general obligations under article 2 of the Convention in this regard.

In interpreting article 2 of the Convention, the Court has held that: [i]f the States, pursuant to article 2 of the American Convention, have a positive obligation to adopt the legislative measures necessary to guarantee the exercise of the rights recognized in the Convention, it follows, then, that they also must refrain both from promulgating laws that disregard or impede the free exercise of these rights, and from suppressing or modifying the existing laws protecting them. These acts would likewise constitute a violation of article 2 of the Convention.

The violations of article 5(1) and 5(2) of the Convention to the detriment of Mr Caesar resulted not only from the actions and omissions of State agents, but above all from the very existence and the terms of Trinidad and Tobago's Corporal Punishment Act (*supra* paragraph 73).

The Court has declared this law to be incompatible with article 5 of the American Convention. Once the Convention entered into force for Trinidad and Tobago, the State should have adapted its legislation to the obligations set forth in that treaty, as to ensure the most effective protection of the human rights enumerated therein. It should be reaffirmed that, pursuant to article 2 of the Convention, the duty to adapt domestic legislation is by its very nature one of results and, therefore, the denunciation of the Convention cannot extinguish the State's international obligations assumed while the treaty was in force. Such obligations have an autonomous and automatic character and do not depend upon an actual ruling of the Convention's organs of supervision regarding a specific domestic law.

Having declared the incompatibility of the Corporal Punishment Act with the Convention, the Court finds that, by its failure to abrogate this law following its ratification of the Convention, the State did not comply with its obligations under article 2, in relation to article 5(1) and 5(2) of the Convention.

On whether Mr Caesar's conditions of detention constitute a violation of article 5(1) and 5(2) of the Convention.

In this regard, the Court has held that, in accordance with article 5(1) and (2) of the Convention, ... all persons deprived of their liberty have the right to detention conditions that are compatible with their human dignity. On other occasions, the Court has indicated that detention in conditions of overcrowding, with lack of ventilation and natural light, without a bed for rest and adequate sanitary conditions, in isolation or with undue restrictions upon the visiting schedule, constitute a violation of the right to humane treatment.

In addressing the issue of prison conditions, the Court has taken note of other international instruments, as well as the case law of other international human rights institutions. Recently, the Court has held that the State is placed in a special position of guarantor in relation to persons deprived of their freedom, since penitentiary authorities have full control over the persons subjected to their custody. In this very particular context of subordination between the detainee and the State, the latter has a special responsibility to ensure to those persons under its control conditions that permit them to retain a degree of dignity consistent with their inherent and non-derogable human rights.

In the case of Hilaire, Constantine and Benjamin et al the Court found that the conditions of detention in several Trinidad and Tobago prisons were characterized by serious overcrowding, inadequate sanitation and poor hygiene and medical care.

The Court concluded that the conditions in which the victims of that case were incarcerated were “in fact indicative of the general conditions in Trinidad and Tobago’s prison system”, compelling the victims “to live under circumstances that impinge on their physical and psychological integrity and therefore constitute cruel, inhuman and degrading treatment”.

As set out in the proven facts of this judgment, during his detention Mr Caesar has been held along with other prisoners in small and poorly ventilated cells, equipped with a slop pail instead of a toilet, and has been obliged to sleep on the floor. Since his incarceration, Mr Caesar has also suffered from serious health problems. Although examined by medical personnel on several occasions, Mr Caesar’s medical treatment has nonetheless been inadequate and his health conditions have deteriorated with the passage of time (*supra* paragraphs 49(16) and 49(18)).

The Court finds that the conditions of detention to which Mr Caesar has been subjected have failed to respect his physical, mental, and moral integrity as required under article 5(1) of the Convention, and constitute inhuman and degrading treatment contrary to article 5(2) of the Convention, which enshrines provisions of *jus cogens*.

Therefore, the Court holds that the State is also responsible for the violation of these provisions, in conjunction with article 1(1) of the Convention, to the detriment of Mr Winston Caesar.

9. ARTICLES 8 AND 25 OF THE AMERICAN CONVENTION IN CONJUNCTION WITH ARTICLES 1(1) AND 2 OF THE CONVENTION (RIGHT TO A FAIR TRIAL AND JUDICIAL PROTECTION)

- (a) Arguments of the Commission
- (b) Arguments of the Representatives
- (c) The Court’s Assessment

Article 8(1) of the American Convention provides for the right to a fair trial as follows...

Article 25(1) of the American Convention guarantees the right to judicial protection as follows...

There are two issues that the Court must address regarding the alleged violations of articles 8(1) and 25, all in connection with articles 1(1) and 2, of the American Convention:

- (a) the reasonableness of the length of the criminal proceedings; and

- (b) whether the domestic law of the State provides an effective remedy against either the existence or the application of corporal punishment.

The Court notes that, after the judgment delivered by the Court of Appeal of Trinidad and Tobago on 28 February 1996, Mr Caesar still had the possibility to apply for leave to appeal to the Privy Council. The Court cannot share the Commission's view that Mr Caesar was subjected to a total delay of fifteen years in the proceedings, to be calculated between his initial arrest in 1983 and his "attempt to pursue an appeal before the Judicial Committee of the Privy Council in 1998". That "attempt" consisted in a legal opinion rendered in November 1998 by counsel in London, at the request of Mr Caesar's lawyers, and therefore cannot be equated to a procedural step in a judicial process. The length of the proceedings must be calculated, therefore, on the basis that the final judgment in the case was reached with the decision of the Court of Appeal of Trinidad and Tobago on 28 February 1996.

Although neither the Commission nor the representatives raised the issue of the Court's *ratione temporis* jurisdiction, it is incumbent on the Tribunal to consider this question in the context of the actual duration of the criminal proceedings in order to come to a conclusion as to the reasonableness of the time elapsed, for the purpose of deciding whether there was a violation of the rights enshrined in article 8(1) of the Convention.

On this point, the Court has held as follows:

"When codifying general law on this issue, article 28 of the Vienna Convention on the Law of Treaties establishes that:

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."

In cases where the Court decided that it had no *ratione temporis* jurisdiction to decide upon certain facts, it has made it clear that this situation does not imply a judgment about the existence of those facts.

In cases where the applicant alleged the violation of articles 5(3) or 6(1) of the European Convention on Fundamental Rights and Freedoms, the European Court of Human Rights has restricted its considerations to the time period that falls into its *ratione temporis* jurisdiction, starting from the date on which the State recognized the right of individual petition or ratified the Convention. It is significant, however, that the European Court nevertheless takes into account the amount of time that has elapsed before this effective date in cases of detention or in a legal proceeding, for example – in its assessment of rights violations.

The Court notes that the criminal proceedings lasted for more than 12 years, if calculated from the first arrest of Mr Caesar on 11 November 1983, as the Commission

and the representatives have done. However, as Trinidad and Tobago's recognition of the Court's compulsory jurisdiction took effect on 28 May 1991, the Court can only consider the period between the date of that recognition and the decision of the Court of Appeal on 28 February 1996, the final judgment delivered in the criminal proceedings. Mr Caesar was convicted on 10 January 1992 by the High Court of Trinidad and Tobago. His lawyers waited for almost two years to request leave to appeal and, on 28 February 1996, the Court of Appeal dismissed the appeal and confirmed the sentence. Therefore, the Court finds that the duration of the criminal proceedings between 28 May 1991, and 28 February 1996 discounting the period of almost two years before that leave to appeal was sought does not constitute a delay that can be considered unreasonable, in the terms of article 8(1) of the Convention.

For the aforementioned reasons, the Court considers that the State is not responsible for a violation of article 8(1) of the Convention.

The Court must now turn to examine whether the domestic law of the State provides an effective remedy against either the existence or the application of corporal punishment.

In the instant case, domestic judges were authorized to sentence Mr Caesar to flogging with the "cat-nine-tails" under the laws of Trinidad and Tobago specifically, the Corporal Punishment Act.

It is important to note that, even if Mr Caesar had been able to appeal to the Privy Council, such an appeal would have been most unlikely to succeed. In this regard the expert witness Desmond Allum commented that: [o]ne of the fundamental reasons why there has been no substantial challenge to the legality of a sentence of corporal punishment is the "savings clause". This clause effectively ensured that it was not open to [domestic] courts to impugn the constitutionality of a sentence of corporal punishment as this [clause] predated the coming into force of the 1976 Constitution, and accordingly, was "saved" into [Trinidad and Tobago's] law as good law. In the recent case of *Matthew v The State of Trinidad and Tobago*, the Judicial Committee of the Privy Council considered the "savings clause" in the context of the death penalty. The majority of the Board of the Privy Council held that the mandatory death penalty is a cruel and unusual punishment, and is therefore inconsistent with sections 4(a) and 5(2)(b) of the Constitution. However, a majority of the Board held that the legislation imposing the mandatory death penalty was passed prior to the Constitution, and, because of the "savings clause" in section 6, it could not be invalidated by reference to the fundamental rights for which sections 4 and 5 of the Constitution provide. Accordingly, the majority upheld the validity of the mandatory death penalty.

Similarly, in a 2002 judgment with regard to a case in the Bahamas, the Judicial Committee of the Privy Council observed that "... it is accepted that flogging is an inhuman and degrading punishment and, unless protected from constitutional challenge under some other provision of the Constitution, is rendered unconstitutional by [the

provision of the Constitution prohibiting torture and inhuman or degrading treatment or punishment]”. Nevertheless, on the basis of the “savings clause” in the Constitution of the Bahamas, the Privy Council upheld the constitutionality of the legislation authorising corporal punishment.

It follows from the above that the State did not provide the alleged victim with an effective remedy to challenge the application of the aforementioned corporal punishment.

Therefore, the Court considers that Trinidad and Tobago is responsible for the violation of article 25, in relation to articles 1(1) and 2, of the Convention, to the detriment of Mr Caesar.

10. REPARATIONS

Application of article 63(1) of the American Convention.

- (a) Arguments of the Commission
- (b) Arguments of the Representatives
- (c) The Court’s Assessments

In accordance with the analysis set forth in previous chapters, the Court declared, based on the facts of the case, violations of article 5(1) and 5(2) in conjunction with article 1(1) of the American Convention, article 2, in relation to article 5(1) and 5(2) of the Convention, and article 25 in conjunction with articles 1(1) and 2 of said instrument. The Court has held, on a number of occasions, that any violation of an international obligation resulting in harm carries with it an obligation to provide adequate reparations. Article 63(1) of the American Convention states that: [i]f the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

Fundamental principles of contemporary international law on state responsibility.

Thus, when an illicit act is imputed to the state, there immediately arises a responsibility on the part of that state for the breach of the international norm involved, together with the subsequent duty to make reparations and put an end to the consequences of said violation.

The reparation of harm caused by a violation of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which consists in

restoring the situation that existed before the violation occurred. When this is not possible, as in the present case, it is the task of this Tribunal to order the adoption of a series of measures that, in addition to guaranteeing respect for the rights violated, will ensure that the damage resulting from the infractions is repaired, by way, *inter alia*, of payment of an indemnity as compensation for the harm caused. The obligation to make reparations, which is regulated in all its aspects (scope, nature, modalities, and designation of beneficiaries) by international law, cannot be altered or eluded by the State's invocation of provisions of its domestic law.

Reparations, as the term indicates, consist in those measures necessary to make the effects of the committed violations disappear. The nature and amount of the reparations depend on the harm caused at both the material and moral levels.

Reparations cannot, in any case, entail either the enrichment or the impoverishment of the victim or his or her family.

In light of the above-mentioned criteria, the Court will proceed to analyze the submissions of the Commission and the representatives regarding reparations, in order to determine the pertinent remedial measures to be adopted in the instant case.

11. MORAL DAMAGES

Moral damage may include suffering and affliction caused to the direct victims and their next of kin, detriment to very significant personal values, as well as nonpecuniary alterations in the conditions of existence of a victim or his or her family. Since it is not possible to assign a precise monetary equivalent to non-pecuniary damage, for purposes of comprehensive reparation to victims, the Court must turn to other alternatives: first, payment of an amount of money or delivery of goods or services that can be estimated in monetary terms, which the Court will establish through reasonable application of judicial discretion and equity; and second, acts or works which are public in their scope or effects, commitment to efforts seeking to avoid the repetition of violations, as well as recognition of the victim's dignity.

It is well settled in international jurisprudence that a judgment constitutes, *per se*, a form of reparation. However, considering the circumstances of the present case and its non-pecuniary consequences, the Court deems it appropriate that the moral damages must also be repaired, on grounds of equity, through the payment of compensation.

In order to determine compensation for the moral damage suffered by the victim, the Court has taken into account the aggravating circumstances of his corporal punishment with the "cat-o-nine tails", namely the anguish, deep fear and humiliation suffered by Mr Caesar prior to and during the flogging. Moreover, the Court notes that the delay in executing the sentence increased his anguish while he was waiting to be punished. As a result of the corporal punishment, Mr Caesar continues to experience pain in his shoulders and he has also suffered, *inter alia*, from symptoms of depression, fear,

and anxiety of a severity sufficient to allow the expert witness Robert Ferris to diagnose, at a minimum, an adjustment disorder. And finally, since his incarceration, the victim has suffered from serious health problems that have not been properly treated by state authorities (*supra* paragraphs 49(18), 49(19), 49(21), 49(31), 49(32) and 89).

Taking all of the elements of the present case into account, the Court sees fit, on grounds of equity, to direct Trinidad and Tobago to grant an indemnity of US\$ 50 000-00 (fifty thousand United States of America dollars) to Mr Winston Caesar for moral damages. The Court notes here that no specific arguments or requests regarding Mr Caesar's next-of-kin were submitted.

12. OTHER FORMS OF REPARATION (SATISFACTION MEASURES AND NON-REPETITION GUARANTEES)

In this chapter, the Court will determine the satisfaction measures to repair nonpecuniary damages; such measures seek to impact the public sphere.

The Court declared that the imposition of corporal punishment by flogging is in absolute contravention to the Convention. The aberrant character of such punishment has led the Court to conclude that Mr Caesar was subjected to torture, as well as to other inhuman and degrading treatment due to the conditions of his detention (*supra* paragraphs 70, 73 and 100).

Furthermore, having examined the body of evidence submitted in the instant case, it is clear that Mr Caesar's physical and psychological problems persist and have not been properly treated (*supra* paragraph 49(32)). Consequently, as it has on other occasions, the Court directs the State to provide Mr Caesar, with effect from the date of notification of this judgment, through its national health services, free of charge and for such period as may be necessary, such medical and psychological care and medication as may be recommended by appropriately qualified specialists.

Having found that the Corporal Punishment Act is incompatible with the terms of article 5(1) and 5(2) of the Convention (*supra* paragraphs 73 and 94), the Court directs the State to adopt, within a reasonable time, such legislative or other measures as may be necessary to abrogate the Corporal Punishment Act.

The Court has held that "section 6 of the Constitution of the Republic of Trinidad and Tobago of 1976 establishes that no law in effect prior to the date the Constitution entered into force may be the object of constitutional challenge under sections 4 and 5 ... The Mandatory Death Penalty Act was declared incompatible with the American Convention and thus any provision that establishes that Act's immunity from challenge is likewise incompatible, by virtue of the fact that Trinidad and Tobago, as a Party to the Convention at the time that the acts took place, cannot invoke provisions of its domestic law as justification for failure to comply with its international obligations". Similarly, inasmuch as it immunises the Corporal Punishment Act from challenge, the "savings

clause” under section 6 of Trinidad and Tobago's Constitution is incompatible with the Convention. Therefore, the Court orders the State to amend, within a reasonable time, section 6 of Trinidad and Tobago's Constitution insofar as that provision denies persons effective recourse to a competent court or tribunal for remedy against violations of their human rights.

The Commission and the representatives also argued that the State's penitentiary system permits prisoners to be detained in conditions that fail to respect their rights to physical and mental integrity and to humane treatment. In this regard, the Court has also found that the prison conditions to which Mr Caesar has been subjected are contrary to article 5(2) of the Convention and are representative of Trinidad and Tobago's prison system (*supra* paragraph 49(22) and 100). Therefore, the Court deems it necessary to order the State, as it did in the case of Hilaire, Constantine, Benjamin et al and as a guarantee of non-repetition, to adopt, within a reasonable time, all necessary measures to bring the conditions of its prisons into compliance with the relevant international human rights norms.

13. COSTS AND FEES

Since the representatives claimed no costs or expenses before the Court, as they are acting *pro bono*, and the Commission did not submit any observations on this point, the Court makes no award with regard to costs and expenses in the present case.

14. MEANS OF COMPLIANCE

The State is directed to pay the compensation ordered (*supra* paragraph 128) within one year of the notification of this judgment and to adopt the other measures of reparation ordered in accordance with the provisions of paragraphs 131 to 134 of this judgment.

The payment of the compensation ordered in favor of the victim shall be made directly to him. If he has died, the payment shall be made to his heirs.

The State may comply with its obligations by payment in United States dollars or the equivalent amount in national currency, using the rate of exchange between the two currencies in force on the market in New York, United States of America, the day before payment, in order to make the respective calculation.

If, due to causes that can be attributed to the beneficiary of the compensation, he is unable to claim such compensation within the said period of one year, the State shall deposit such amount in his favour in an account or a deposit certificate in a reputable national banking institution, in United States dollars or the equivalent in Trinidad and Tobago currency and in the most favourable financial

conditions allowed by legislation and banking practice. If, after ten years, the compensation has not been claimed, the sum shall be returned to the State, with the interest earned.

The payment ordered in this judgment as compensation for moral damages may not be affected, reduced or conditioned by any current or future taxes or charges. Consequently, it shall be paid in full to the victim in accordance with the present judgment.

If the State falls in arrears, it shall pay interest on the amount owed, corresponding to bank interest on arrears in Trinidad and Tobago.

In accordance with its consistent practice, the Court retains the authority, inherent in its competence, to monitor compliance with this judgment. The instant case shall be closed when the State has fully implemented all of the provisions of this judgment. Within one year of notification of this judgment, the State shall provide the Court with a first report on the measures taken in compliance.

15. OPERATIVE PARAGRAPHS

(a) The Court

(i) Declares

Unanimously, that:

- (1) The State violated the right enshrined in article 5(1) and 5(2) in conjunction with article 1(1) of the American Convention on Human Rights, to the detriment of Mr Winston Caesar, in the terms of paragraphs 70, 73, 89 and 100 of this judgment.
- (2) The State breached its obligations established in article 2 of the American Convention on Human Rights, in relation to article 5(1) and 5(2) of the Convention, to the detriment of Mr Winston Caesar, in the terms of paragraph 94 of this judgment.
- (3) The State did not violate the right enshrined in article 8(1) of the American Convention on Human Rights, for the reasons set forth in paragraphs 106 to 112 of this judgment.
- (4) The State violated the right enshrined in article 25 in conjunction with articles 1(1) and 2 of the American Convention on Human Rights, to the detriment of Mr Winston Caesar, in the terms of paragraphs 113 to 117 of this judgment.
- (5) This judgment constitutes, per se, a form of reparation, in the terms of paragraph 126 of this judgment.

(b) And Decides

Unanimously, that:

- (1) The State shall pay the compensation ordered in paragraph 128 of this judgment to Winston Caesar for moral damages.
- (2) The State shall, with effect from the date of notification of this judgment, provide Mr Winston Caesar, through its national health services, free of charge and for such period as may be necessary, such medical and psychological care and medication as may be recommended by appropriately qualified specialists, in the terms of paragraph 131 of this judgment.
- (3) The State shall adopt, within a reasonable time, such legislative or other measures as may be necessary to abrogate the Corporal Punishment Act (Offenders Over Eighteen), in the terms of paragraph 132 of this judgment.
- (4) The State shall amend, within a reasonable time, section 6 of Trinidad and Tobago's Constitution, in the terms of paragraph 133 of this judgment.
- (5) The State shall adopt, within a reasonable time, such measures as may be necessary to bring the conditions of detention in its prisons into compliance with the relevant international human rights norms, in the terms of paragraph 134 of this judgment.
- (6) The State shall pay the compensation ordered in favor of Mr Winston Caesar directly to him within one year of the notification of this judgment, in the terms of paragraph 128 of this judgment.
- (7) The State may comply with the pecuniary dispositions in this judgment by payment in United States dollars or the equivalent amount in national currency, using the rate of exchange between the two currencies in force on the market in New York, United States of America, on the day preceding the day of payment.
- (8) If, for reasons attributable to the recipient of the compensation herein ordered, he is unable to claim such compensation within the stipulated period of one year, the State shall deposit such amount in his favour in an account or a deposit certificate in a reputable national banking institution, in the terms of paragraph 139 of this judgment.
- (9) The payment for moral damages ordered in this judgment shall not be subject to or affected or reduced by any existing or future taxes or charges, in the terms of paragraph 140 of this judgment.
- (10) If the State falls into arrears in the payments ordered, it shall pay interest on the amount owed at the going bank rate in Trinidad and Tobago.
- (11) It shall monitor compliance with this judgment and shall close the instant case when the State has fully implemented all of its provisions. Within one year of the notification of this judgment, the State shall provide the Court with a report on the measures taken in compliance, in the terms of paragraph 142 of this judgment. Judges García-Ramírez, Jackman, Cançado-Trindade and Ventura-Robles advised the Court of their Concurring Opinions, which accompany this judgment.

Drafted in San José, Costa Rica, on 11 March 2005, in English and Spanish, both texts being authentic.

JACKMAN J: The present judgment, with which I wholly concur, is of particular importance for at least three reasons: its reaffirmation that the practice of corporal punishment by States Parties to the American Convention on Human Rights (“the Convention”) is in flagrant breach of that treaty; its insistence on the absolute necessity that States should respect their treaty obligations; and its rejection of the dismal device known as “savings clauses” which have the effect of permitting certain states in the Commonwealth Caribbean the luxury of simultaneously reprobating and approbating internationally illicit behaviours.

1. CORPORAL PUNISHMENT

The Court’s judgment adequately details the extent to which international human rights jurisprudence has outlawed this cruel, inhuman, and degrading punishment, so that there is no need for me to dilate on it further. It is, however, worth noting that, quite apart from the international opprobrium which this practice has attracted, the Supreme Court of a jurisdiction with great constitutional similarity to Trinidad and Tobago had no difficulty, in the Barbadian case of *Hobbs et al v R*, in finding that flogging with the cat-o-nine tails is, in the words of Chief Justice Sir Denys Williams, “...inhuman within the meaning of section 15(1) [of the Constitution of Barbados]” and “...degrading within the meaning of section 15(1)”. The section referred to by the learned Chief Justice reads as follows:

15(1) No person shall be subjected to torture or to inhuman or degrading punishment of other treatment. The relevant Trinidad and Tobago constitutional provision states that:

...The Parliament may not... impose or authorize the imposition of cruel and unusual treatment or punishment ... *Pacta sunt servanda*. But, will Trinidad and Tobago comply with the decision of the Court? To judge from its failure to participate in the hearing of this case, and given its previous contemptuous attitude in the Hilaire case, compliance is, to say the least, unlikely. This despite the State’s indisputable responsibility under international law to answer to the Inter-American human rights system for any violations of the Convention alleged to have taken place during the period from 28 May 1991, the day on which the State ratified the Convention and recognised the compulsory jurisdiction of the Court, and 26 May 1999, the day on which its denunciation of the Convention took legal effect.

The principle that states should abide in good faith by the terms of treaties into which they voluntarily enter (*pacta sunt servanda*) is the bedrock of international comity and international law. Article 26 of the Vienna Convention on the Law of

Treaties (“the Vienna Convention”) reads as follows: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith”.

It ought to be obvious that good faith compliance is of even greater importance in the area of international human rights law, where what is at stake is not the impersonal interests of states but the protection of the fundamental rights of the individual. Trinidad and Tobago’s denunciation of the Convention was profoundly regrettable for the cause of a universal regime of human rights protection, but the State was fully within its rights to take that unprecedented step. But its contumelious refusal to acknowledge its continuing obligations under a treaty that remained in force for it when the violations in this case took place represents a gratuitous attack on the Rule of Law, all the more astonishing in a State that, like other Commonwealth Caribbean states, prides itself on its Common Law traditions, where respect for human rights and for the Rule of Law are deeply embedded in the legal culture. At present, in the wake of Trinidad and Tobago’s brief sojourn and precipitous withdrawal, only four of those states are party to the Convention. Only one, Barbados, has accepted the contentious jurisdiction of the Court. On the evidence of that State’s recent refusal, in the context of its very first procedural contact with the Court, to obey an interlocutory Order of the Court in a matter referred to the Court by the Inter-American Commission under the terms of article 63.2 of the Convention, it seems that Barbados is bent on following the scofflaw example of its CARICOM colleague and neighbour. Although unlike Trinidad and Tobago in the instant case – Barbados has displayed a minimum of courtesy in actually making a response to the Order of the Court, that response is in the form of a claim that the State is exempt from the Court’s jurisdiction, on the juridically incoherent ground that to obey any such order would conflict with its Constitution. This is in direct antithesis to the precept contained in article 27 of the Vienna Convention: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” There is, unfortunately, no evidence that any of the Commonwealth Caribbean States Parties to the Convention has taken action to meet the obligation set out in article 2, “Domestic Legal Effects”, viz: “Where the exercise of any of the rights or freedoms referred to in article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.” “Savings Clauses” As the Court has found both in the instant case and, previously, in the Hilaire case, section 6 of the Trinidad and Tobago Constitution, the so-called “savings clause”, (mirrored in similar constitutional provisions in the Commonwealth Caribbean) has the effect of protecting from scrutiny in the national Courts certain State acts that would otherwise be in breach of the fundamental rights provisions of the said Constitution. However, by virtue of the principle set out in article 26 of the Vienna Convention, this does not exempt the State from its duty under

international law; to the extent that such a provision purports so to do, it constitutes a clear breach of the relevant international obligations.

Countries that enter voluntarily and sovereignly into treaties cannot pick and choose which treaty obligations to obey and which to flout. Even where reservations are entered, it is clearly settled international law and practice that such reservations must not be “incompatible with the object and purpose of the treaty”. (Vienna Convention: article 19).

Trinidad and Tobago has exercised its sovereign right to denounce and withdraw from the Convention. No State, however, having committed itself to an international agreement, can in good faith refuse to abide by those obligations which it unambiguously undertook to honour during the period of the treaty’s validity. This would make a mockery of international law and, in the particular case of human rights treaties, would undermine a regime of international concern for the individual human being that dates back at least to the Universal Declaration of Human Rights. That there is emerging a clear tendency on the part of Commonwealth Caribbean states in this dismal direction, with its implications for the integrity and inclusiveness of the Inter-American system, is a matter of the very gravest concern.

TRINDADE J: I have concurred with my vote in the adoption of the present Judgment of the Inter-American Court of Human Rights in the *Caesar v Trinidad and Tobago* case. Given the relevant legal issues dealt with by the Court in its decision, as well as those underlying it and those surrounding the present case, I feel obliged to leave on the records my personal reflections on them as foundations of my position on the matter. I shall address, in the present Separate Opinion, the following points which I consider of key importance, not only for a better understanding of the Court’s decision in the present Caesar case, but also for the handling of future cases in which such issues may possibly also be raised:

- (a) the humanization of the law of the treaties, as illustrated by developments concerning interpretation of treaties, reservations to treaties, denunciation of treaties, and termination and suspension of the operation of treaties;
- (b) international rule of law: non-appearance before an international tribunal and the duty of compliance with its judgment; and
- (c) the expanding material content and scope of *jus cogens* in contemporary international law.

The Humanization of the Law of Treaties.

It is hardly surprising that basic considerations of humanity surround recently emerged domains of international law, such as that of the international protection of human rights. But the incidence of those considerations upon more traditional areas of international law, which were in the past approached, almost invariably,

from the angle of the “will” of States, is indicative of the new times, and a new mentality centred rather on the ultimate addressees of international norms, the human beings.

The law of treaties affords a pertinent illustration, disclosing that it is no longer entirely at the mercy of the “will” of States and that it, too, acknowledges certain superior common values that the international community as a whole deems should be preserved. Pertinent examples can be found in such areas of the law of treaties pertaining to interpretation of treaties, reservations to treaties, denunciation of treaties, and termination and suspension of the operation of treaties. I shall review, however succinctly, each of them, before presenting my concluding observations on the matter.

1. CONSIDERATIONS ON THE INTERPRETATION OF TREATIES

(a) General Remarks

When one comes to the interpretation of human rights treaties, as well as of other international treaties, one is inclined to resort at first to the provisions enshrined in articles 31–33 of the two Vienna Conventions on the Law of Treaties (of 1969 and 1986, respectively), and in particular to the combination under article 31 of the elements of the ordinary meaning of the terms, the context, and the object and purpose of the treaties at issue. One then promptly finds that, in practice, while in traditional law there has been a marked tendency to pursue a rather restrictive interpretation which gives as much precision as possible to the obligations of States Parties, in the international law of human rights, somewhat distinctly, there has been a clear and special emphasis on the element of the object and purpose of the treaty, so as to ensure an effective protection (*effet utile*) of the guaranteed rights.

Whilst in general international law the elements for the interpretation of treaties evolved primarily as guidelines for the process of interpretation by States Parties themselves, human rights treaties, in their turn, have called for an interpretation of their provisions bearing in mind the essentially objective character of the obligations entered into by States Parties: such obligations aim at the protection of human rights and not at the establishment of subjective and reciprocal rights for the States Parties. Hence the special emphasis on the element of the object and purpose of human rights treaties, of which the case-law of the two regional the Inter-American and the European-Courts of Human Rights gives eloquent testimony.

The interpretation and application of human rights treaties have been guided by considerations of a superior general interest or *ordre public* which transcend the individual interests of Contracting Parties. As indicated by the jurisprudence constante of the two international human rights tribunals, those treaties are distinct

from treaties of the classic type, incorporating restrictively reciprocal concessions and compromises; human rights treaties prescribe obligations of an essentially objective character, implemented collectively by mechanisms of supervision of their own. The rich caselaw on methods of interpretation of human rights treaties has enhanced the protection of the human person at international level and has enriched International Law under the impact of the International Law of Human Rights.

The converging case-law to this effect has generated the common understanding, in the regional (European and Inter-American) systems of human rights protection, that human rights treaties are endowed with a special nature (as distinguished from multilateral treaties of the traditional type); that human rights treaties have a normative character, of *ordre public*; that their terms are to be autonomously interpreted; that in their application one ought to ensure an effective protection (*effet utile*) of the guaranteed rights; that the obligations enshrined therein do have an objective character, and are to be duly complied with by the States Parties, which have the additional common duty of exercise of the collective guarantee of the protected rights; and that permissible restrictions (limitations and derogations) to the exercise of guaranteed rights are to be restrictively interpreted. The work of the Inter-American and European Courts of Human Rights has indeed contributed to the creation of an international *ordre public* based upon the respect for human rights in all circumstances.

As I have pondered in my Separate Opinion in the *Blake v Guatemala* (reparations, 1999) before the Inter-American Court of Human Rights, "... in so far as human rights treaties are concerned, one is to bear always in mind the objective character of the obligations enshrined therein, the autonomous meaning (in relation to the domestic law of the States) of the terms of such treaties, the collective guarantee underlying them, the wide scope of the obligations of protection and the restrictive interpretation of permissible restrictions. These elements converge in sustaining the integrity of human rights treaties, in seeking the fulfilment of their object and purpose, and, accordingly, in establishing limits to State voluntarism.

From all these, one can detect a new vision of the relations between public power and the human being, which is summed up, ultimately, in the recognition that the State exists for the human being, and not vice-versa".

Another aspect to be here recalled is that of the autonomous meaning of the terms of human rights treaties (as distinct from their meaning, e.g. in domestic law).

The point, stressed by the Human Rights Committee (under the UN Covenant on Civil and Political Rights) in the adoption of its views in the *Van Duzen v Canada* [1982], has also been taken up by the two regional-European and Inter-American Courts of Human Rights. The European Court has endorsed the doctrine of autonomous interpretation in its judgments, for example, in the

Ringeisen [1971], *König* [1978] and *Le Compte* [1981 and 1983] cases. The Inter-American Court, in its turn, in its sixth Advisory Opinion, on The Word “Laws” in article 30 of the American Convention on Human Rights (1986), clarified that the word “laws” in article 30 of the American Convention, to be examined in accordance not only with the principle of legality but also with that of legitimacy, means a juridical norm of a general character, turned to the “general welfare”, emanated from the legislative organs constitutionally foreseen and democratically elected, and elaborated according to the procedure for law-making established by the Constitutions of States Parties.

Moreover, the dynamic or evolutive interpretation of the respective human rights Conventions (the intertemporal dimension) has been followed by both the European Court and the Inter-American Court, so as to fulfil the changing needs of protection of the human being; in its sixteenth and pioneering Advisory Opinion, on The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law (1999), which has inspired the international case-law in *statu nascendi* on the matter, the Inter-American Court has clarified that, in its interpretation of the norms of the American Convention, it should extend protection in new situations (such as that concerning the observance of the right to information on consular assistance) on the basis of pre-existing rights. The same vision has been propounded by the Inter-American Court in its subsequent forward-looking eighteenth Advisory Opinion on the Juridical Condition and Rights of Undocumented Migrants (2003).

There is a converging case-law of the two regional Human Rights Courts and indeed of other human rights international supervisory organs on this issue. Thus, the European Court of Human Rights has reiteratedly pronounced to that effect; in the *Loizidou v Turkey* [1995], for example, the European Court expressly discarded undue restrictions which would not only “seriously weaken” its role in the discharge of its functions but “would also diminish the effectiveness of the Convention as a constitutional instrument of European public order (*ordre public*)”. The Inter-American Court of Human Rights, on its part, has likewise repeatedly stressed the object and purpose of human rights treaties and the objective character of the obligations ensuing therefrom, as well as the special character of human rights treaties, as distinguished from multilateral treaties of the traditional type.

Such convergence of views of the two regional Human Rights Courts on the fundamental issue of the proper interpretation of human rights treaties naturally ensues from the overriding identity of the object and purpose of those treaties. General international law itself bears witness of the principle (apparently subsumed under the general rule of interpretation of article 31 of the two Vienna Conventions on the Law of Treaties) whereby the interpretation is to enable a treaty to have appropriate effects, a principle which has been resorted to against

eventual calls for an unduly restrictive interpretation. There is a jurisprudence constante pointing towards the restrictive interpretation of provisions which limit or restrict the exercise of recognised human rights.

An aspect which in this respect should not pass unnoticed is that derogation measures and limitations must not be inconsistent with the other obligations under international law incumbent upon the State Party concerned: thus, neither derogation clauses, nor limitation provisions, of a given human rights treaty, are to be interpreted to restrict the exercise of any human rights protected to a greater extent by other human rights treaties to which the State Party concerned is also a Party. Such understanding finds support in the rule of international law whereby the interpretation and application of a treaty cannot restrict a State's obligations ensuing from other treaties on the subject in the present case, human rights protection to which the State at issue is also a Party. In the present domain, international law has been made use of in order to improve and strengthen and never to weaken or undermine the protection of recognised human rights.

The specificity of the international law of human rights finds expression not only in the interpretation of human rights treaties in general but also in the interpretation of specific provisions of those treaties. Pertinent illustrations can be found in, e.g. provisions which contain references to general international law. Such is the case, for example, of the requirement of prior exhaustion of local remedies as a condition of admissibility of complaints or communications under human rights treaties; the local remedies rule bears witness of the interaction between international law and domestic law in the present domain of protection, which is fundamentally victim-oriented, concerned with the rights of individual human beings rather than of States. Generally recognised principles or rules of international law which the formulation of the local remedies rule in human rights treaties refers to, besides following an evolution of their own in the distinct contexts in which they apply, necessarily suffer, when inserted in human rights treaties, a certain degree of adjustment or adaptation, dictated by the special character of the object and purpose of those treaties and by the widely recognised specificity of the international law of human rights.

(b) Procedural Issues

Both the European and Inter-American Courts have rightly set limits to State voluntarism, have safeguarded the integrity of the respective human rights Conventions and the primacy of considerations of *ordre public* over the will of individual States, have set higher standards of State behaviour and established some degree of control over the interposition of undue restrictions by States, and have reassuringly enhanced the position of individuals as subjects of the International Law of Human Rights, with full procedural capacity. In so far as the basis of their jurisdiction in there was no room for implied limitations (limitations *implicites*); the view has ever since prevailed that the only limitations or restrictions permissible

are those for which the human rights treaty itself makes express provision. The *obiter dicta* of the Inter-American Court of Human Rights in its seventh Advisory Opinion, on the Enforceability of the Right to Reply or Correction (1986) reinforce the necessarily restrictive interpretation of restrictions to the exercise of rights recognised in human rights treaties.

The two international human rights Tribunals, by correctly resolving basic procedural issues raised in the aforementioned cases, have aptly made use of the techniques of public international law in order to strengthen their respective jurisdictions of protection of the human person. They have decisively safeguarded the integrity of the mechanisms of protection of the American and European Conventions on Human Rights, whereby the juridical emancipation of the human person vis-à-vis her own State is achieved. They have, furthermore, achieved a remarkable jurisprudential construction on the right of access to justice (and of obtaining reparation) at international level.

In its historical Judgment in the case, concerning *Peru, of the massacre of Barrios Altos* [2001] e.g:

- (a) the Inter-American Court warned that provisions of amnesty, of prescription and of factors excluding responsibility, intended to impede the investigation and punishment of those responsible for grave violations of human rights (such as torture, summary, extra-legal or arbitrary executions, and forced disappearances) are inadmissible;
- (b) they violate non-derogable rights recognised by the International Law of Human Rights. This case-law has been reiterated by the Court (with regard to prescription) in its decision in the *Bulacio v Argentina* [2003].
- (c) Substantive Law.

As to substantive law, the contribution of the two international human rights Courts to this effect is illustrated by numerous examples of their respective case-law pertaining to the rights protected under the two regional Conventions. The European Court has a vast and impressive case-law, for example, on the right to the protection of liberty and security of person (article 5 of the European Convention), and the right to a fair trial (article 6). The Inter-American Court has a significant case-law on the fundamental right to life, comprising also the conditions of living, as from its decision in the paradigmatic case of the so-called “Street Children” *Villagrán Morales and others v Guatemala, Merits* [1999].

Yet another example can be recalled. The definition of the crime of torture found today in two of the three co-existing Conventions against Torture (the UN Convention of 1984, article 1, and the Inter-American Convention of 1985, article 2) owes its contents to international human rights case-law, rather than to the tipification of the crime of torture at domestic law level. In fact, the constitutive

elements of torture in the definition found in the two aforementioned Conventions ensue from the jurisprudential construction of the old European Commission of Human Rights in the *Greek* [1967- 1970], further discussed by the Commission and the European Court in the *Ireland v United Kingdom* [1971-1978].

In this particular instance, international case-law influenced international legislation in the field of human rights protection. The extensive case-law of the European Court covers virtually the totality of the rights protected under the European Convention and some of its Protocols. The growing case-law of the Inter-American Court, in its turn, appears innovative and forward-looking with regard to the right to life, reparations in its multiple forms, and provisional measures of protection, these latter sometimes benefiting members of entire human collectivities 74.2. Considerations on the Reservations to Treaties.

International supervisory organs in the domain of human rights protection have in recent years disclosed their awareness and, on some occasions, their determination to the effect of preserving the integrity of human rights treaties. It may be recalled that, inspired in the criterion sustained by the International Court of Justice in its Advisory Opinion of 1951 on the Reservations to the Convention against Genocide, the present system of reservations set forth in the two Vienna Conventions of the Law of Treaties (of 1969 and 1986, articles 19-23), in joining the formulation of reservations to the acquiescence or the objections thereto for the determination of their compatibility with the object and purpose of the treaties, is of a markedly voluntarist and contractualist character.

Such a system leads to a fragmentation (in the bilateral relations) of the conventional obligations of the States Parties to multilateral treaties, appearing inadequate to human rights treaties, which are inspired in superior common values and are applied in conformity with the notion of collective guarantee. That system of reservations suffers from notorious insufficiencies when transposed from the law of treaties in general into the domain of the International Law of Human Rights. To start with, it does not distinguish between human rights treaties and classic treaties, making abstraction of the jurisprudence constante of the organs of international supervision of human rights, converging in pointing out that distinction.

It allows reservations (not objected) of a wide scope which threaten the very integrity of human rights treaties; it allows reservations (not objected) to provisions of these treaties which incorporate universal minimum standards (undermining, e.g the basic judicial guarantees of inviolable rights). If certain fundamental rights starting with the right to life are non-derogable (in the terms of the human rights treaties themselves), thereby not admitting any derogations which, by definition, are of an essentially temporal or transitory character, with greater reason, it would seem to me, a fortiori they do not admit any reservations, perpetuated in time until and unless withdrawn by the State at issue; such reservations would be, in my

understanding, without any caveat, incompatible with the object and purpose of those treaties.

Although the two Vienna Conventions on the Law of Treaties prohibit the acceptance of reservations incompatible with the object and purpose of the treaty at issue, they leave, however, various questions without answers. The criterion of the compatibility is applied in the relations with the States which effectively objected to the reservations, although such objections are often motivated by factors including political other than a sincere and genuine concern on the part of the objecting States with the prevalence of the object and purpose of the treaty at issue. For the same reason, from the silence or acquiescence of the States Parties in relation to certain reservations one cannot infer a belief on their part that the reservations are compatible with the object and purpose of the treaty at issue.

Such silence or acquiescence, moreover, appears to undermine the application of the criterion of the compatibility of a reservation with the object and purpose of the treaty.

And the two Vienna Conventions referred to are not clear either, as to the legal effects of a non-permissible reservation, or of an objection to a reservation considered incompatible with the object and purpose of the treaty at issue. They do not clarify, either, who ultimately ought to determine the permissibility or otherwise of a reservation, or to pronounce on its compatibility or otherwise with the object and purpose of the treaty at issue.

The present system of reservations permits even reservations (not objected) which hinder the possibilities of action of the international supervisory organs (created by human rights treaties), rendering difficult the realization of their object and purpose. The above-mentioned Vienna Conventions not only fail to establish a mechanism to determine the compatibility or otherwise of a reservation with the object and purpose of a given treaty, but even more gravely do not impede either that certain reservations or restrictions formulated (in the acceptance of the jurisdiction of the organs of international protection) come to hinder the operation of the mechanisms of international supervision created by the human rights treaties in the exercise of the collective guarantee.

Practice, rescued by the International Court of Justice and the two Vienna Conventions on the Law of Treaties, for having crystallised itself in the relations between States, not surprisingly appears entirely inadequate to the treaties whose ultimate beneficiaries are the human beings and not the Contracting Parties. Definitively, human rights treaties, turned to the relations between States and human beings under their jurisdiction, do not bear a system of reservations which approaches them as from an essentially contractual and voluntarist perspective, undermining their integrity, allowing their fragmentation, leaving at the discretion

of the Parties themselves the final determination of the extent of their conventional obligations.

As the two Vienna Conventions of 1969 and 1986 do not provide any indication for an objective application of the criterion of the compatibility or otherwise of a reservation with the object and purpose of a treaty, they leave it, on the contrary, to be applied individually and subjectively by the Contracting Parties themselves, in such a way that, at the end, only the reserving State knows for sure the extent of the implications of its reservation. Despite the efforts in expert writing to the effect of systematizing the practice of States on the matter, it is difficult to avoid the impression that such practice has been surrounded by uncertainties and ambiguities, and has remained inconclusive to date.

This indefinition is not at all reassuring for human rights treaties, endowed as they are with mechanisms of international supervision of their own. This general picture of indefinition has thus, not surprisingly, led the UN International Law Commission (ILC) to engage itself, as from 1998, in the preparation of a Draft Practical Guide on Reservations to Treaties (cf *infra*).

It calls the attention, for example, to find one's extensive list of reservations, numerous and at times long, and often incongruous, of States Parties to the UN Covenant on Civil and Political Rights; and the practical problems generated by many of the reservations (also numerous and not always consistent) of the States Parties to the UN Convention on the Elimination of All Forms of Discrimination against Women are well-known, to what one may add the reservations to the UN Convention against Torture and the Convention on the Elimination of All Forms of Racial Discrimination.

With the persistence of the inadequacy and the insufficiencies of the present system of reservations, it is not at all surprising that, firstly, multiple expressions of dissatisfaction in this respect in contemporary legal doctrine (both in general studies on the matter and in respect of specific human rights treaties); and secondly, the preparedness of human rights international supervisory organs to assert their competence to apply by themselves the criterion of the compatibility (*supra*) and to contribute thereby to secure the integrity of the respective human rights treaties.

At regional level, in its well-known judgment in the *Belilos v Switzerland* [1988] locus classicus on the issue, the European Court of Human Rights considered the declaration amounting to a reservation (of a general character) of Switzerland to the European Convention on Human Rights incompatible with the object and purpose of this latter (in the light of its article 64). On its turn, the Inter-American Court of Human Rights, in its second and third Advisory Opinions, pointed out the difficulties of a pure and simple transposition from the system of reservations of the Vienna Convention on the Law of Treaties of 1969 into the domain of the international protection of human rights.

At global level, in the *I Gueye et alii v France* [1989], e.g. the Human Rights Committee (under the UN Covenant on Civil and Political Rights), in spite of a reservation *ratione temporis* of the respondent State, understood that the question at issue was justiciable under the Covenant, and concluded that there was a violation of article 26 of the Covenant. The same Committee, in its general comment number 24(52), of November 1994, warned that the provisions of the two Vienna Conventions and the classic rules on reservations (based upon reciprocity) were not appropriate to the human rights treaties; given the special character of the Covenant as a human rights treaty, the question of the compatibility of a reservation with its object and purpose, instead of being left at the discretion of the manifestations of the States Parties *inter se*, should be objectively determined, on the basis of juridical principles, by the Human Rights Committee itself.

Given the specificity of the International Law of Human Rights, there appears a strong case for leaving the determination of the compatibility or otherwise of reservations with the object and purpose of human rights treaties with the international supervisory organs established by them, rather than with the States Parties themselves; it would be more in keeping with the special character of human rights treaties. To the two international human rights tribunals (the European and Inter-American Courts), the individualistic system of reservations does not seem to be in keeping with the notion of collective control machinery proper to human rights treaties.

The *obiter dicta* of the two regional Human Rights Courts have been rendered despite the fact that the European Convention (article 64) and the American Convention (article 75) on Human Rights do not expressly confer this function upon them; the American Convention, in fact, limits itself to referring to the pertinent provisions of the 1969 Vienna Convention on the Law of Treaties.

Given the uncertainties, ambiguities and lacunae in the present system of reservations to treaties of the two Vienna Conventions of 1969 and 1986 (*supra*), proposals have been advanced in contemporary doctrine tending at least to reduce the tension as to the proper application of human rights treaties in the matter of reservations, namely: first, the inclusion of an express indication in human rights treaties of the provisions which do not admit any reservations (such as those pertaining to the fundamental non-derogable rights), as an irreducible minimum to participate in such treaties; second, as soon as the States Parties have proceeded to the harmonization of their domestic legal order with the norms of those treaties (as required by these latter), the withdrawal of their reservations to them; third, the modification or rectification, by the State Party, of a reservation considered nonpermissible or incompatible with the object and purpose of the treaty, whereby a reservation would thus be seen no longer as a formal and final element of the manifestation of State consent, but rather as an essentially temporal measure, to be

modified or removed as soon as possible; fourth, the adoption of a possible “collegial system” for the acceptance of reservations, so as to safeguard the normative character of human rights treaties, bearing in mind, in this respect, the rare example of the Convention on the Elimination of All Forms of Racial Discrimination; fifth, the elaboration of guidelines (although not binding) on the existing rules (of the two Vienna Conventions of 1969 and 1986) in the matter of reservations, so as to clarify them in practice; and sixth, the attribution to the depositaries of human rights treaties of the faculty to request periodic information from the reserving States on the reasons why they have not yet withdrawn their reservations to such treaties.

The recent work (as from 1993) of the International Law Commission of the United Nations on the topic of the Law and Practice Concerning Reservations to Treaties tends to identify the essence of the question in the need to determine the powers of the human rights international supervisory organs in the matter, in the light of the general rules of the law of treaties. This posture makes abstraction of the specificity of the International Law of Human Rights, attaching itself to the existing postulates of the law of treaties. The debates of 1997 of the International Law Commission focused effectively on the question of the applicability of the system of reservations of the Vienna Conventions in relation to human rights treaties. Although the point of view prevailed that the pertinent provisions of those Conventions should not be modified, it was acknowledged that that system of reservations should be improved, given its lacunae, above all in relation to non-permissible reservations.

In the debates of the Commission, it was even admitted that the conventional organs of protection of judicial character (the regional European and Inter-American Courts of Human Rights) pronounce on the permissibility of reservations when necessary to the exercise of their functions; such considerations were reflected in the “Preliminary Conclusions on Reservations to Multilateral Normative Treaties Including Human Rights Treaties”, adopted by the Commission in 1997 (paragraphs 4-7). In my understanding, there are compelling reasons to go further, and the relevant labour of the ILC on the matter could lead to solutions satisfactory to human rights international supervisory organs to the extent that it started from the recognition of the special character of human rights treaties and gave precision to the juridical consequences for the treatment of the question of reservations which ensue from that recognition.

It seems unlikely, however, that it is prepared to pursue that approach. In its more recent version of its Draft Guidelines on Reservations to Treaties (2003), provisionally adopted by the ILC, it urged States and international organizations to “undertake a periodic review” of their reservations to treaties, and to “consider withdrawing those which no longer serve their purpose”, though it did not pursue the aforementioned approach. Such review, – added the ILC, “should devote special attention to the aim of preserving the integrity of multilateral treaties”.

Thus, draft guideline 2.5.3 reflects the concerns of monitoring bodies (“particularly but not exclusively in the field to human rights”), to call often upon States to reconsider their reservations and if possible to withdraw them. The ILC has conceded that “The reference to the integrity of multilateral treaties is an allusion to the drawbacks of reservations, that may undermine the unity of the treaty regime”.

It may be pointed out that human rights treaties have in a way been singled out when one comes to denunciation, and termination and suspension of the operation of treaties; I see, thus, no epistemological or juridical reason why the same could not be done also in relation to reservations. In my view, the conferment of the power of determination of the compatibility or otherwise of reservations with the object and purpose of human rights treaties on the international supervisory organs themselves created by such treaties, would be much more in conformity with the special nature of these latter and with the objective character of the conventional obligations of protection.

There is a whole logic and common sense in attributing such power to those organs, guardians as they are of the integrity of human rights treaties, instead of abandoning such determination to the interested States Parties themselves, as if they were, or could be, the final arbiters of the scope of their conventional obligations.

Such system of objective determination would foster the process of progressive institutionalisation of the international protection of human rights, as well as the creation of a true international public order (*ordre public*) based on the full respect to, and observance of, human rights. It is about time for the current process of humanization of International Law to encompass likewise the domain of the law of treaties, traditionally so vulnerable to manifestations of State voluntarism.

It is my understanding that, from the perspective of a minimally institutionalised international community, the system of reservations to treaties, such as it still prevails in our days, is rudimentary and rather primitive. There is pressing need to develop a system of objective determination of the compatibility or otherwise of reservations with the object and purpose of human rights treaties, although for that it may be considered necessary an express provision in future human rights treaties, or the adoption to that effect of protocols to the existing instruments.

Only with such a system of objective determination will we succeed in guarding coherence with the special character of human rights treaties, which set forth obligations of an objective character and are applied by means of the exercise of the collective guarantee. Only thus will we succeed to establish, in the ambit of the law of treaties, standards of behaviour which contribute to the creation of a true international *ordre public* based on the respect and observance of human rights, with the corresponding obligations *erga omnes* of protection. We stand in

need of the renovation and humanization of the law of treaties as a whole, comprising also the forms of manifestation of State consent.

I do not see how not to take into account the experience of international supervision accumulated by the conventional organs of protection of human rights in the last decades. Any serious evaluation of the present system of reservations to treaties cannot fail to take into account the practice, on the matter, of such organs of protection. It cannot pass unnoticed that the International Court of Justice, in its already mentioned Advisory Opinion of 1951, effectively recognised, in a pioneering way, the special character of the Convention for the Prevention and Punishment of the Crime of Genocide of 1948, but without having extracted from its acknowledgement all the juridical consequences for the regime of reservations to treaties.

Almost half a century having lapsed, this is the task which is incumbent upon us, all of us who have the responsibility and the privilege to act in the domain of the international protection of human rights. The words pronounced by the Hague Court in 1951 remain topical nowadays, in pointing out that, in a Convention such as that of 1948, adopted for a “purely humanitarian” purpose, “... the Contracting States do not have any interest of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the Convention.

Consequently, in a Convention of this type one cannot speak of individual advantages and disadvantages to States, of the maintenance of a perfect contractual balance between rights and duties.

The high ideals which inspired the Convention provide, by virtue of the common will of the Parties, the foundation and measure of all its provisions”.

I see no sense in trying to try to escape from the acknowledgement of the specificity of the International Law of Human Rights as a whole, the recognition of which, in my understanding, in no way threatens the unity of Public International Law; quite on the contrary, it contributes to develop the aptitude of this latter to secure, in the present domain, compliance with the conventional obligations of protection of the States vis-à-vis all human beings under their jurisdictions. With the evolution of the International Law of Human Rights, it is Public International Law itself which is justified and legitimised, in affirming juridical principles, concepts and categories proper to the present domain of protection, based on premises fundamentally distinct from those which have guided the application of its postulates at the level of purely inter-State relations.

One is not, therefore, here proposing that the development of the International Law of Human Rights be brought about to the detriment of the law of treaties: my understanding, entirely distinct, is in the sense that the norms of the law of treaties (such as those set forth in the two above-mentioned Vienna Conventions, anyway

of a residual character) can greatly enrich with the impact of the International Law of Human Rights, and develop their aptitude to regulate adequately the legal relations at inter-State as well as intra-State levels, under the respective treaties of protection. In sustaining the development of a system of objective determination – which seems to us wholly necessary of the compatibility or otherwise of reservations with the object and purpose of human rights treaties in particular, in which the organs of international protection created by such treaties would exert an important role, we do not see in that any threat to the “unity” of the law of treaties.

Quite on the contrary, there could hardly be something more fragmenting and underdeveloped than the present system of reservations of the two Vienna Conventions, for which reason it would be entirely illusory to assume that, to continue applying it as until now, one would thereby be fostering the “unity” of the law of treaties.

The true unity of the law of treaties, in the framework of Public International Law, would be better served by the search for improvement in this area, overcoming the ambiguities, uncertainties and lacunae of the present system of reservations, through the development of a system of objective determination (*supra*), in conformity with the special nature of human rights treaties and the objective character of the conventional obligations of protection. The unity of Public International Law itself is measured rather by its aptitude to regulate legal relations in distinct contexts with equal adequacy and effectiveness.

(c) Considerations on the Denunciation of Treaties

The two Vienna Conventions on the Law of Treaties (1969 and 1986) determine that a treaty which contains no provision on denunciation is not subject to denunciation, unless it can be established that the parties intended to admit the possibility of denunciation of that this latter “may be implied by the nature of the treaty” (article 56(1)). The two Vienna Conventions thus open the way to the taking into account of the nature or specificity of certain treaties. As already seen, the special nature of treaties of a humanitarian character (such as human rights treaties) has indeed been taken into account, and has been widely acknowledged. Accordingly, certain limits have been established with regard to the denunciation of such treaties.

In fact, basic considerations of humanity have permeated also the clauses of denunciation of certain treaties. This is aptly illustrated, e.g. by the provisions on denunciation of the four Geneva Conventions on International Humanitarian Law of 1949. According to those provisions (common article 63/62/142/158), the denunciation, which will take effect one year after its notification, shall not, however, while the denouncing power is engaged in a conflict, take any effect

“until peace has been concluded”, and until the “operations connected with the release and repatriation of the persons protected” by the Geneva Conventions “have been terminated”. In this way, the obligations of the Parties as to the safeguard of the persons protected under those Conventions subsist, in whatever circumstances, vis-à-vis the denouncing power, while the conflict lasts and the release and repatriation of the persons protected are not concluded.

Furthermore, the denunciation provisions of the aforementioned four Geneva Conventions (common article 63/62/142/158) expressly preserves the obligations based on “the principles of the law of nations” as they result from “the laws of humanity” and “the dictates of the public conscience” (the Martens clause). Such obligations, as aptly remarked by BVA Röling, continue governing human conduct even when treaties are no longer binding, contrary to, I would add, what positivists would mechanically argue. As I have sustained at length in my Concurring Opinion in this Court’s Advisory Opinion number 18 on the Juridical Condition and Rights of Undocumented Migrants (2003), the law of protection of the human being does not exhaust itself in the norms and rules of positive law, it encompasses likewise the principles (which inform and conform those norms and rules), without which there is no legal system at all.

Half a decade after the adoption of the 1969 Vienna Convention on the Law of Treaties, HW Briggs pertinently pointed out that the consideration of that Convention in international case-law “has been helpful in furthering the consolidation of the law against unilateral denunciation of international agreements without accountability therefore”. The 1984 UN Convention against Torture, in this line of concern, provides (article 31(2)) that a denunciation of it shall not have the effect of releasing the denouncing Party from its obligations under the Convention with regard to “any act or omission which occurs prior to the date at which the denunciation becomes effective”, nor shall the denunciation prejudice in any way the “continued consideration” of any matter already under scrutiny by the UN Committee against Torture “prior to the date at which the denunciation becomes effective”.

At regional level, the European Convention on Human Rights, as amended by Protocol number 11, provides (article 58) likewise that a denunciation of it shall not have the effect of releasing the denouncing Party from its obligations under the Convention in respect of “any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective”. On its turn, in a similar line of thinking, the 1999 Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities determines (article 23) that a denunciation of it “shall not exempt” the State Party from the obligations imposed upon it under the Convention in respect of “any action or omission prior to the date on which the denunciation takes effect”.

And the American Convention on Human Rights (article 78) only admits denunciation “at the expiration of a five-year period from the date of its entry into force”, and by means of “notice given one year in advance”. Moreover, such a denunciation shall not have the effect of releasing the denouncing State Party from the obligations contained in the Convention with respect to “any act that may constitute a violation of those obligations” and that “has been taken by that State prior to the effective date of denunciation”. The issue of the effects of denunciation, within such limits, became a central one in recent cases concerning Trinidad and Tobago under the American Convention on Human Rights.

Trinidad and Tobago became a Party to the American Convention on Human Rights on 28 May 1991, and accepted the Inter-American Court's jurisdiction in contentious matters on that same date. Later on, on 26 May 1998, it denounced the American Convention; pursuant to article 78 of the Convention, such denunciation began to have effects one year later, on 26 May 1999. One day before this date the Inter-American Commission on Human Rights filed before the Court the Hilaire case; subsequently, after that date, it lodged with the Court the Constantine et alii case (on 22 February 2000) and the Benjamin et alii case (on 5 October 2000), the three of them concerning Trinidad and Tobago.

As they pertained to acts taken by that State prior to the date of its denunciation, the Court retained jurisdiction and took cognizance of the cases (pursuant to article 78(2) of the Convention), and rendered its Judgments on preliminary objections in the three cases on 1 September 2001, dismissing an undue restriction formulated by the State in its instrument of acceptance of the Court's compulsory jurisdiction (reiterated in the three cases in the form of a preliminary objection). That restriction would have limited the Court's jurisdiction to the extent that its exercise would be consistent with the national Constitution; the Court considered it incompatible with the object and purpose of the Convention, and an attempt to subordinate this latter to the national Constitution, what would be inadmissible.

The Court then ordered the joinder of the three cases and their respective proceedings (on 30 November 2001), and delivered its Judgment on the merits, finding violations of the American Convention, on 21 June 2002. Parallel to that, also after the denunciation by Trinidad and Tobago became effective (on 26 May 1999), the Court ordered successive Provisional Measures of Protection, from 27 May 1999 to 2 December 2003, in the case *James et alii v Trinidad and Tobago* (as they also pertained to acts taken by the State prior to the date of its denunciation of the Convention). All these decisions of the Court remain binding upon the respondent State; its denunciation of the Convention does not have the sweeping effect that one might *prima facie* tend to assume, as the denunciation clause under the American Convention (*supra*) was surrounded by temporal limitations so as not to allow it to undermine the protection of human rights thereunder.

Thus, not even the institution of denunciation of treaties is so absolute in effects as one might *prima facie* tend to assume. Despite its openness to manifestations of State voluntarism, denunciation has, notwithstanding, been permeated with basic considerations of humanity as well, insofar as treaties of a humanitarian character are concerned. Ultimately, one is here faced with the fundamental, overriding and inescapable principle of good faith (*bona fides*), and one ought to act accordingly.

(d) Considerations on the Termination and Suspension of the Operation of Treaties

The interpretation and application of human rights treaties bear witness of the twilight of reciprocity and of the prominence of considerations of *ordre public* in the present domain. In fact, the prohibition of the invocation of reciprocity as a subterfuge for non-compliance with humanitarian conventional obligations, is corroborated in unequivocal terms by the 1969 Vienna Convention on the Law of Treaties, which, in providing for the conditions in which a breach of treaty may bring about its termination or suspension of its operation, excepts expressly and specifically the “provisions relating to the protection of the human person contained in treaties of a humanitarian character” (article 60(5)).

The provision of article 60(5) of the two Vienna Conventions on the Law of Treaties (1969 and 1986), acknowledging the special nature of “treaties of a humanitarian character” and setting forth one of the juridical consequences ensuing therefrom, constitutes a safeguard clause in defence of the human person. In this sense I saw it fit to point out, in a study on the matter published 14 years ago, that “the law of treaties itself of our days, as confirmed by article 60(5) of the Vienna Convention [on the Law of Treaties], discards the precept of reciprocity in the implementation of the treaties of international protection of human rights and of International Humanitarian Law, by virtue precisely of the humanitarian character of those instruments. Piercing the veil in a domain of international law – such as the one concerning treaties so strongly infiltrated by the voluntarism of States, the aforementioned provision of article 60(5) of the Vienna Convention de Viena constitutes a clause of safeguard in defence of the human being”.

In the account of one of the participants in the 1968-1969 Vienna Conference from which the first Vienna Convention on the Law of Treaties (1969) resulted, the provision at issue resulted from a Swiss amendment, promptly supported by several Delegations, to the effect that the grounds for termination or suspension of operation of treaties should not apply to treaties of a humanitarian character, embodying provisions of protection of the human person. Article 60(5) was maintained in the second Vienna Convention on the Law of Treaties (1986). Another participant in the Vienna Conference of 1968-1969 pondered that there are certain obligations of protection of the human person endowed with an

“absolute character”, which cannot be allowed to reduce, as “*l'idée d'une régression définitive de la conscience humaine est difficile à accepter. En revanche il serait souhaitable que la pratique internationale se moralise dans tous les domaines et acquière ainsi, par la reconnaissance des États, un niveau croissant de valeur: il pourrait et il devrait y avoir normalement de nouvelles règles progressives. Sans qu'il soit nécessaire d'insister sur ce point, les racines profondes d'une telle conception rejoignent la tradition du droit naturel, rajeunie de nos jours par la conception du droit naturel à contenu progressif. En ce sens aussi, on pourrait soutenir que les règles impératives ont dépassé le stade coutumier pour atteindre un niveau plus stable qui est celui des principes généraux du droit international public*”.

Thus, the contemporary law of treaties itself, as attested by article 60(5) of the 1969 and the 1986 Vienna Conventions, overcoming the precept of reciprocity in the implementation of treaties of a humanitarian character, reckons that the obligations enshrined therein are of ordre public, and may generate effects erga omnes. The overcoming of reciprocity in human rights protection has taken place amidst the constant search for an expansion of the ambit of protection (for the safeguard of an increasingly wider circle of individuals, in any circumstances), for achieving a higher degree of the protection due, and for the gradual strengthening of the mechanisms of supervision, in the defense of common superior values.

(e) Concluding Observations

Last but not least, attention should also be drawn to the interaction of human rights treaties in the process of interpretation. Given the multiplicity of those treaties, it comes as little or no surprise that the interpretation and application of certain provisions of a given human rights treaty have at times been resorted to as orientation for the interpretation of corresponding provisions of another usually newer human rights treaty. The practice of international supervisory organs – including under the two regional, European and Inter-American, systems of protection affords several examples of such interpretative interaction.

Moreover, given the possible concurrent interpretation of equivalent provisions of two or more human rights treaties, there is room for the search of the most favourable norm to the alleged victim. This test primacy of the most favourable norm to the individual, gathers express support in certain provisions of such human rights treaties such as article 29(b) of the American Convention on Human Rights, and has found application in practice.

The essential motivation underlying the interpretation of human rights treaties has been, rather than to ensure the uniformity of international law in general and in all circumstances whatsoever, to respond effectively to the needs and imperatives of the international protection of human beings. In proceeding in this way, international supervisory organs – such as the two regional Human Rights Courts – have constructed a converging jurisprudence as to the special nature of human

rights treaties and the implications and consequences ensuing therefrom. This has been largely due to the overriding identity of the object and purpose of those treaties. The reassuring result has been a uniform interpretation of the International Law of Human Rights. This, in turn, has contributed significantly to the development of international law in the present domain of protection.

Thus, a chapter of international law usually approached in the past from the outlook of State voluntarism, comes nowadays to be seen in a different light, under the influence of basic considerations of humanity. Although this chapter of international law, the law of treaties, has been opened to manifestations of the individual "will" of States, as from the issue of the treating-making power itself, the fact cannot keep on being overlooked that basic considerations of humanity have marked their presence also in the law of treaties. As demonstration of this evolution, developments pertaining to the interpretation of treaties, reservations to treaties, denunciation of treaties, and termination and suspension of operation of treaties disclosed a certain preparedness to elaborate freely on areas such as those, so as to search for responses to the contemporary needs of the international community.

Like International Law in general, the law of treaties in particular is undergoing a historical process of humanization as well. It cannot pass unnoticed, as timely recalled by Egon Schwelb three decades ago, that the preambles themselves of the two Vienna Conventions on the Law of Treaties (of 1969 and 1986) contain an assertion of the principle of universal respect for, and observance of, human rights. The treaty-making power is no longer an exclusive prerogative of States, as it used to be in the past; the 1986 [second] Vienna Convention on the Law of Treaties came to address the treaty-making of international organizations, some of which devoted to causes of direct interest to human beings and humankind as a whole.

The interpretation of treaties has been considerably enriched by the methodology pursued by international supervisory organs of human rights treaties. Such interpretation has adjusted itself to the specificity of human rights treaties. It has, moreover, favoured a harmonization of the standards of implementation of the protected rights in the domestic legal order of the States Parties to those treaties. The two international human rights Tribunals (the European and Inter-American Courts) have been engaged in a converging jurisprudential construction in respect of reservations to treaties to the effect of avoiding to deprive human rights treaties of their effect utile, thus preserving the mechanisms of protection of the human person established by them.

(f) International Rule of Law: Non-Appearence and the Duty of Compliance

Until the Inter-American Court's Judgments of 1 September 2001 dismissing Trinidad and Tobago's preliminary objections in the *Hilaire, Constantine et alii*, and

Benjamin et alii cases (cf *supra*), the respondent State appeared before the Court, having participated in the contentious proceedings and presented its arguments before the Court. In the *Hilaire* case, in particular, it appeared before the Court in the public hearing of 10 August 2000, wherein it submitted its views in an orderly and procedurally constructive way. After being notified of the Court's adverse decision, Trinidad and Tobago no longer appeared before the Court, neither in the proceedings on the merits in the aforementioned cases (joined), nor in the proceedings of the subsequent and present *Caesar* case.

Despite its non-appearance, Trinidad and Tobago remains bound by the Court's Judgments in all these cases: though rendered after its denunciation of the American Convention, they pertain to acts taken by the State before the denunciation, in accordance with the terms of article 78 of the American Convention. Together with the subsequent Judgments on the merits and reparations, the Court's decisions remain all binding upon the respondent State, and an eventual failure of this latter to comply with the Court's Judgments on the merits and reparations in those previous cases and with the present Judgment in the *Caesar* case, would amount to an additional violation of the American Convention (article 68), as well as of general international law (*pacta sunt servanda*), with all the juridical consequences attached thereto.

Any interpretation to the contrary, tending to "explain" or "justify" non-compliance with the Judgments, would amount to contempt of Court, and disclose a lack of familiarity with the most elementary principles of international legal procedure. A State may, of course, choose not to appear before the Court, but in doing so it ought to bear the consequences of such non-appearance, rendering itself unable to rebut the evidence produced and to defend itself. What a State is not entitled to do is to ignore a Judgment that is clearly binding upon it, as that would undermine the very foundations of international jurisdiction, which have required so much endeavour from past generations to be built and established in this part of the world.

Having always been a strong supporter of the cause of international justice, I feel obliged to state in the present Separate Opinion that international jurisdiction cannot be left at the mercy of the caprice of governments, usually under the pressure of haphazard domestic factors, and those who have no constraints to undermine it are to bear the historical responsibility for such deconstruction. I feel confident that Trinidad and Tobago will not come to this extreme.

Trinidad and Tobago seems to be aware of the temporal and material limitations of denunciation under article 78 of the American Convention (*supra*), as it participated in proceedings before the Court afterwards, including a public hearing of 10 August 2000 in the *Hilaire* case, more than one year after its denunciation of the American Convention began to have effects (as from 26 May

1999). What is rather enigmatic is its subsequent and prolonged non-appearance not to say “disappearance” before the Court after its Judgments on preliminary objections (*supra*), adverse to it. Nonappearance does not at all pave the way for non-compliance. A State may choose not to appear before the Court, at any stage of the proceedings, at its own risk, but it cannot ignore the Court's Judgment without having its international responsibility thereby engaged.

Trinidad and Tobago's sudden non-appearance before the Court, or rather, disappearance from it, is certainly to be regretted. It does not foster the rule of law at international level, to say the least. If it is meant to be a prior notice of eventual noncompliance with decisions of the Court, then the respondent State has strong reasons for concern, as the Law would not stand on its side. Let us hope this will prove not to be the case. But were it to be so, Trinidad and Tobago would then stand outside the Law, thus incurring into an additional violation of the American Convention.

Although non-appearance has occurred from time to time in inter-State litigation (e.g. before the Permanent Court of International Justice [PCIJ] and the International Court of Justice [ICJ]), there is no compelling reason why it should take place in proceedings in human rights cases, opposing States to individuals, the ostensibly weaker party. If by non-appearance the State is announcing eventual non-compliance with the decisions of the Tribunal, it should bear the juridical consequences of its attitude, and the other States Parties should react to that, in the exercise of the collective guarantee underlying all human rights treaties. Non-appearance does not affect the condition of the State as a party to the case; whether it likes it or not, it remains the respondent State in the case, even in absentia.

Article 68(1) of the American Convention is clear in determining that “the States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties”. Non-appearing States remain parties to the cases at issue.

Their duty of compliance corresponds to a basic principle of the law on the international responsibility of the State, strongly supported by international case-law, whereby States ought to comply with their conventional obligations in good faith (*pacta sunt servanda*). It is somewhat surprising to witness that, as time goes by and the old ideal of the realization of international justice gains ground (as with, for example, the recent establishment of the International Criminal Court, pursuant to an original proposal by Trinidad and Tobago at the United Nations), some States remain resistant to the operation of the most perfected means of settlement of disputes at international level, that is, judicial settlement (as illustrated, ironically, by the posture of Trinidad and Tobago in the aforementioned cases in the inter-American human rights system).

The precedent among others set up by the United States, of “withdrawal” and non-appearance before the ICJ, after a Judgment adverse to it on preliminary

objections (in 1984) in the *Nicaragua v United States* case, would be a very bad example for Trinidad and Tobago to follow. On the occasion, the United States earned much criticism from distinct corners of the international community, including from some of its own most distinguished jurists (like the late Keith Highet), for its disservice to the international rule of law. In the words of K Highet, the strategy of non-appearance “may also backfire”, and “may suffer a setback, once its absurdity and overall uselessness are correctly perceived... The negative forces undermining the progressive development of international law – non-production, noncooperation and non-appearance ... will now be seen for what they are”.

In the same line of thinking, it was further pointed out, in other commentaries, that the United States' defiant behaviour of withdrawing from that case and no longer appearing in its proceedings before the ICJ “appears not only injurious to the efficacy of the Court's compulsory jurisdiction under article 36(2), but detrimental to the development of international lawfulness as well. Such lawfulness cannot develop as long as States are inclined to place themselves above the law”.

Is this the sad example that Trinidad and Tobago would really wish to follow? I could hardly believe it. How would that appear to the future generations of its own jurists?

Expectations from the new generations of jurists are always high, hoping that they will succeed to right the wrongs made by their predecessors, while, on the other hand, politicians (also referred to rather elegantly as “decision-makers”) look the same everywhere in the world, and there seem to be no compelling reasons to expect much from them.

Not only do they look the same everywhere, but they have further looked the same at all times. Already over three centuries before our era, in his *Nicomachean Ethics*, Aristotle could hardly hide or dissimulate his concern as to what politicians might be thinking or what decisions were they about to take. In the 13th century, in his *Treatise on the Law*, Thomas Aquinas wondered whether the *recta ratio* could ever be apprehended by the power-holders. It would be hard to deny that, with extremely rare exceptions, politicians, always and everywhere, have appeared much more engaged in gaining and retaining power (for power's sake), than in securing the observance of the human rights of those they govern or are supposed to represent.

The States which, in the history of international adjudication, have “withdrawn” from contentious proceedings instituted against them (particularly after an initial decision of the Tribunal adverse to them), have adopted a “self-judging conduct”, harmful to the international rule of law, and, ultimately, also to themselves, to their own reputation, as “A State which would be a judge in its own cause is an advocate pleading into a void from which no clear answer is returned”.

Non-appearance is in fact foreseen in article 53 of the Statute of the ICJ, its *raison d'être* being to secure that the Court carries out its functions whenever one of the parties fails to appear before it; the non-appearing State remains a party to the case, and remains fully bound by the decision rendered by the Court (as if it had appeared before the Court). This is what ensues also from article 27 (on default procedure) of the current Rules of Procedure of the Inter-American Court, which likewise foresee non-appearance in the same understanding, and entitle the Inter-American Court, whenever a party fails to appear in or continue with a case, to take such measures, on its own motion, as may be necessary to complete the consideration of the case. Article 27 adds that when a party enters a case at a later stage of the proceedings, it shall take up the proceedings at that stage.

In most cases, non-appearance has been resorted to aiming at exerting pressure upon the complaining party and the Court, but experience shows that nonappearing States have hardly gained anything – except criticisms – from such harmful conduct. Furthermore, it is to be kept always in mind that non-appearance and non-compliance are not synonymous at all; non-appearing or “disappeared” States are under the duty to comply with Judgments in absentia (*pacta sunt servanda*).

On this particular subject, the Institut de Droit International adopted a clarifying resolution in its session of Basel of 1991, in which it took into account the difficulties that non-appearance of a party may present to the other party and to the Court itself.

In its preamble, the resolution pondered *inter alia* that “the absence of a party is such as to hinder the regular conduct of the proceedings, and may affect the good administration of justice”. The resolution recalled, in its operative part, the State's “duty to cooperate in the fulfilment of the Court's judicial functions” (article 2), and added that “Each State entitled ... to appear before the Court and with respect to which the Court is seized of a case is ipso facto ... a party to the proceedings, regardless of whether it appears or not” (article 1).

The resolution of the Institut further provided that, notwithstanding the nonappearance of a State, this latter remains “bound by any decision of the Court in that case, whether on jurisdiction, admissibility or the merits” (article 4). And the resolution concluded that “a State's non-appearance before the Court is in itself no obstacle to the exercise by the Court of its functions” (article 5). This is an accurate statement of the applicable law in cases of non-appearance, which by no means can be taken to lead to non-compliance, amounting to an additional violation of international law.

(g) The Expanding Material Content and Scope of *Jus Cogens* in Contemporary International Law

May I conclude this Separate Opinion in the present Caesar case in a positive tone, with an expression of support for the present Judgment in absentia of the Inter-

American Court, in respect particularly to two remaining aspects that I see it fit to dwell upon here.

Firstly, the Court has expressly and rightly admitted in the present Caesar case that, in certain circumstances, the existence of a law (such as that of Corporal Punishment Act of Trinidad and Tobago), manifestly incompatible with the relevant provisions of the American Convention (article 5(1) and (2)), may per se constitute by its nature and effects a violation of this latter. In support of this view, may I refer to my arguments, to this effect, in my Dissenting Opinion in the *El Amparo* case, concerning Venezuela (Judgments on reparations, of 14 September 1996), as well as in my Dissenting Opinion in the Caballero Delgado and Santana case, pertaining to Colombia (Judgment on reparations, of 29 January 1997), which I do not find it necessary to reiterate literally herein.

Secondly, and most importantly, in the present Judgment in the Caesar case, the Court has rightly acknowledged that the prohibition of torture as well as of other cruel, inhuman and degrading treatment, has entered into the domain of jus cogens. Corporal punishment, such as the one examined in the *cas d'espèce*, is per se in breach of the Convention (article 5(1) and (2)) and of peremptory norms of international law (paragraphs 70, 88 and 100). In several of my Individual Opinions presented in this Court, I have drawn attention to the relevance of the expanding material content and scope of jus cogens. The present Judgment is inserted into this reassuringly evolutive jurisprudential construction.

Thus, in its historical Advisory Opinion number 18 on The Juridical Condition and the Rights of the Undocumented Migrants (of 17 September 2003), the Inter-American Court significantly held that the aforementioned fundamental principle of equality and nondiscrimination, in the present stage of evolution of International Law, “has entered into the domain of the jus cogens”; on such principle, which “permeates every legal order”, the Court correctly added, “rests the whole juridical structure of the national and international public order”. The Court, moreover, referred to the evolution of the concept of jus cogens, transcending the ambit of both the law of treaties and of the law of the international responsibility of the State, so as to reach general international law and the very foundations of the international legal order.

In support of this view, in my Concurring Opinion in that pronouncement of the Court (Advisory Opinion number 18), after summarizing the history of the entry of jus cogens into the conceptual universe of international law, I maintained that “The emergence and assertion of jus cogens in contemporary International Law fulfil the necessity of a minimum of verticalization in the international legal order, erected upon pillars in which the juridical and the ethical are merged. ...

On my part, I have always sustained that it is an ineluctable consequence of the affirmation and the very existence of peremptory norms of International Law their not being limited to the conventional norms, to the law of treaties, and their being extended

to every and any juridical act. Recent developments point out in the same sense, that is, that the domain of the *jus cogens*, beyond the law of treaties, encompasses likewise general international law¹⁴⁸. Moreover, the *jus cogens*, in my understanding, is an open category, which expands itself to the extent that the universal juridical conscience (material source of all Law) awakens for the necessity to protect the rights inherent to each human being in every and any situation”.

To the international objective responsibility of the States corresponds necessarily the notion of objective illegality (one of the elements underlying the concept of *jus cogens*).

In our days, no one would dare to deny the objective illegality of acts of genocide, of systematic practices of torture, of summary and extra-legal executions, and of forced disappearance of persons, practices which represent crimes against humanity, condemned by the universal juridical conscience, parallel to the application of treaties. Already in its Advisory Opinion of 1951 on the Reservations to the Convention against Genocide, the International Court of Justice pointed out that the humanitarian principles underlying that Convention were recognizedly ‘binding on States, even without any conventional obligation’.

... In sum and conclusion on the point under examination, the emergence and assertion of *jus cogens* evoke the notions of international public order and of a hierarchy of legal norms, as well as the prevalence of the *jus necessarium* over the *jus voluntarium*; *jus cogens* presents itself as the juridical expression of the very international community as a whole, which, at last, takes conscience of itself, and of the fundamental principles and values which guide it”.

In the same line of reasoning, in my Separate Opinion in the case of the *Massacre of Plan de Sánchez* case, concerning Guatemala (Judgment of 29 April 2004), I saw it fit to insist on the point that “The concept itself of *jus cogens*, in my understanding, transcends the ambit of both the law of treaties and the law on the international responsibility of the States, so as to encompass general international law and the very foundations of the international legal order”.

And in my Separate Opinion in the *Tibi v Ecuador* case (Judgment of 7 September 2004), I allowed myself to add that *jus cogens*, besides its horizontal dimension whereby it has a bearing upon the very foundations of international law, also expands itself in “a vertical dimension, of the interaction of the international and national legal orders in the present domain of protection. The effect of *jus cogens*, in this second (vertical) plane, is in the sense of invalidating every and any legislative, administrative or judicial measure which, at the level of the domestic law of the States, attempts to authorize or tolerate torture” (paragraph 32).

Furthermore, in its Judgment of 8 July 2004 in the *Gómez Paquiyauri v Peru* case, the Inter-American Court expressly admitted that, in our days, an international juridical regime has been formed of absolute prohibition of all forms of torture and of extrajudicial executions, and that such prohibition belongs today to the domain of international *jus cogens* (paragraphs 115–116 and 131). In my Separate Opinion in that case I pondered that

such acknowledgement of jus cogens, in constant expansion, in turn, “reveals precisely the reassuring opening of contemporary international law to superior and fundamental values”, pointing towards the emergence of a truly universal international law (paragraph 44). I reaffirmed this understanding, of an absolute prohibition, of jus cogens, of torture, in any circumstance, in my Separate Opinion (paragraph 26) in the *Tibi v Ecuador* case (Judgment of 7 September 2004).

The Judgment this Court has just adopted in the present *Caesar v Trinidad and Tobago* fits squarely into its jurisprudence constante on the evolutive interpretation of jus cogens itself. The Court, here, quite rightly takes a step forward, in upholding the absolute prohibition, proper to the domain of jus cogens, of torture as well as any other cruel, inhuman and degrading treatment. It is relevant to keep on identifying the expanding material content and scope of jus cogens, as the Inter-American Court has been doing in the last years. The Inter-American Court has probably done for such identification of the expansion of jus cogens more than any other contemporary international tribunal. It is important that it continues doing so, in the gradual construction, at this beginning of the 21st century, of a new *jus gentium*, the international law for humankind.

For the appellant:

Information not available

For the respondent:

Information not available

INTERNATIONAL COURT OF JUSTICE YEAR 2004

LEGAL CONSEQUENCES OF THE CONSTRUCTION OF A WALL IN THE OCCUPIED PALESTINIAN TERRITORY GENERAL

LIST NUMBER 1319 JULY 2004

[1] “Legal consequences” of the construction of a wall in the Occupied Palestinian Territory, including in and around East Jerusalem – Scope of question posed- Request for opinion limited to the legal consequences of the construction of those parts of the wall situated in Occupied Palestinian Territory – Use of the term “wall”.

[2] Jurisdiction of the Court to give the advisory opinion requested – Article 65, paragraph 1, of the Statute – Article 96, paragraph 1, of the Charter – Power of General Assembly to request advisory opinions – Activities of Assembly.

[3] Useful purpose of opinion *Nullus commodum – Capere potest de sua injuria propria* – Opinion to be given to the General Assembly, not to a specific State or entity – No “compelling reason” for Court to use its discretionary power not to give an advisory opinion.

Editor’s Summary

The question on which the advisory opinion of the Court was requested, namely, the legal consequences of the construction of a wall in the Occupied Palestinian Territory, was set forth in resolution ES-10/14 adopted by the General Assembly of the United Nations on 8 December 2003 at its Tenth Emergency Special Session. By a letter dated 8 December 2003, the Secretary-General of the United Nations officially communicated to the Court the decision taken by the General Assembly to submit the question for an advisory opinion.

For its part, Israel has argued that the wall’s sole purpose is to enable it effectively to combat terrorist attacks launched from the West Bank. Furthermore, Israel has repeatedly stated that the Barrier is a temporary measure (see report of the Secretary-General, paragraph 29). It did so *inter alia* through its Permanent Representative to the United Nations at the Security Council meeting of 14 October 2003, emphasizing that “[the fence] does not annex territories to the State of Israel”, and that Israel is “ready and able, at tremendous cost, to adjust or dismantle a fence if so required as part of a political settlement” (S/PV4841, page 10). Israel’s Permanent Representative restated this view before the General Assembly on 20 October and 8 December 2003. On this latter occasion, he added: “As soon as the terror ends, the fence will no longer be necessary.”

Held – When seised of a request for an advisory opinion, the Court must first consider whether it has jurisdiction to give the opinion requested and whether,

should the answer be in the affirmative, there is any reason why it should decline to exercise any such jurisdiction.

It is for the Court to satisfy itself that the request for an advisory opinion comes from an organ or agency having competence to make it.

Lack of clarity in the drafting of a question does not deprive the Court of jurisdiction. Rather, such uncertainty will require clarification in interpretation, and such necessary clarifications of interpretation have frequently been given by the Court.

The lack of consent to the Court's contentious jurisdiction by interested States has no bearing on the Court's jurisdiction to give an advisory opinion.

Advisory opinions have the purpose of furnishing to the requesting organs the elements of law necessary for them in their action.

The principle of self-determination of peoples has been enshrined in the United Nations Charter and reaffirmed by the General Assembly in resolution 2625 (XXV) cited above, pursuant to which "Every State has the duty to refrain from any forcible action which deprives peoples referred to [in that resolution] of their right to self-determination".

The protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in article 4 of the International Covenant on Civil and Political Rights and as regards the relationship between international humanitarian law and human rights law, there are three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.

The International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.

The existence of a "Palestinian people" is no longer in issue. Such existence has been recognized by Israel in the exchange of letters of 9 September 1993 between Mr Yasser Arafat, President of the Palestine Liberation Organization (PLO) and Mr Yitzhak Rabin, Israeli Prime Minister.

The construction of the wall and its associated régime impede the liberty of movement of the inhabitants of the Occupied Palestinian Territory (with the exception of Israeli citizens and those assimilated thereto) as guaranteed under article 12, paragraph 1, of the International Covenant on Civil and Political Rights. They also impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the

International Covenant on Economic, Social and Cultural Rights and in the United Nations Convention on the Rights of the Child. Lastly, the construction of the wall and its associated régime, by contributing to the demographic changes contravene article 49, paragraph 6, of the Fourth Geneva Convention and the Security Council resolutions.

Applicable international humanitarian law contains provisions enabling account to be taken of military exigencies in certain circumstances. The military exigencies contemplated by the texts may be invoked in occupied territories even after the general close of the military operations that led to their occupation. However, on the material before it, the Court was not convinced that the destructions carried out contrary to the prohibition in article 53 of the Fourth Geneva Convention were rendered absolutely necessary by military operations.

The construction of the wall, and its associated régime, are contrary to international law.

Israel has an obligation to put an end to the violation of its international obligations flowing from the construction of the wall in the Occupied Palestinian Territory. The obligation of a State responsible for an internationally wrongful act to put an end to that act is well established in general international law.

Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered.

The obligations violated by Israel include certain obligations *erga omnes*. Such obligations are by their very nature “the concern of all States” and, “In view of the importance of the rights involved, all States can be held to have a legal interest in their protection”.

Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end.

Cases referred to in the Advisory Opinion

("A" means adopted; "AL" means allowed; "AP" means applied; "APP" means approved; "C" means considered; "D" means distinguished; "DA" means disapproved; "DT" means doubted; "E" means explained; "F" means followed; "O" means overruled)

United States

Islamic Republic of Iran v United States of America

Nicaragua v United States of America

Portugal v Australia

Others

Lilian Celiberti de Casariego v Uruguay case number 56 of 1979

López Burgos v Uruguay case number 52 of 1979

Montero v Uruguay case number 106 of 1981

Advisory Opinion

SHI P; RANJEVA VP; GUILLAUME, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIJMANS, REZEK, ALKHASAWNEH, BUERGENTHAL, ELARABY, OWADA, SIMMA, TOMKA J AND COUVREUR REGISTRAR:

1. ON THE LEGAL CONSEQUENCES OF THE CONSTRUCTION OF A WALL IN THE OCCUPIED PALESTINIAN TERRITORY

The question on which the advisory opinion of the Court has been requested is set forth in resolution ES-10/14 adopted by the General Assembly of the United Nations (hereinafter the "General Assembly") on 8 December 2003 at its Tenth Emergency Special Session. By a letter dated 8 December 2003 and received in the Registry by facsimile on 10 December 2003, the original of which reached the Registry subsequently, the Secretary-General of the United Nations officially communicated to the Court the decision taken by the General Assembly to submit the question for an advisory opinion...

Advisory opinion to all States entitled to appear before the Court, in accordance with article 66, paragraph 1, of the Statute.

By a letter dated 11 December 2003, the Government of Israel informed the Court of its position on the request for an advisory opinion and on the procedure to be followed.

In the course of hearings held from 23 to 25 February 2004, the Court heard oral statements, in the following order, by:

“For Palestine: ... For the Republic of South Africa: ... For the People’s Democratic Republic of Algeria: ... For the Kingdom of Saudi Arabia: ... For the People’s Republic of Bangladesh... For Belize: ... For the Republic of Cuba... For the Republic of Indonesia: ... For the Hashemite Kingdom of Jordan... For the Republic of Madagascar: ... For Malaysia: ... For the Republic of Senegal: ...For the Republic of the Sudan: ...For the League of Arab States: ... For the Organization of the Islamic Conference: ...”

When seised of a request for an advisory opinion, the Court must first consider whether it has jurisdiction to give the opinion requested and whether, should the answer be in the affirmative, there is any reason why it should decline to exercise any such jurisdiction (see *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996 (I), page 232, paragraph 10).

The Court will thus first address the question whether it possesses jurisdiction to give the advisory opinion requested by the General Assembly on 8 December 2003. The competence of the Court in this regard is based on article 65, paragraph 1, of its Statute, according to which the Court “may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request”.

The Court has already had occasion to indicate that:

“It is a precondition of the Court’s competence that the advisory opinion be requested by an organ duly authorized to seek it under the Charter, that it be requested on a legal question, and that, except in the case of the General Assembly or the Security Council, that question should be one arising within the scope of the activities of the requesting organ.” (Application for Review of Judgement number 273 of the United Nations Administrative Tribunal, Advisory Opinion, ICJ Reports 1982, page 333-334, paragraph 21.)

It is for the Court to satisfy itself that the request for an advisory opinion comes from an organ or agency having competence to make it. In the present instance, the Court notes that the General Assembly, which seeks the advisory opinion, is authorized to do so by article 96, paragraph 1, of the Charter, which provides: “The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.”

Although the above-mentioned provision states that the General Assembly may seek an advisory opinion “on any legal question”, the Court has sometimes in the past given certain indications as to the relationship between the question the subject of a request for an advisory opinion and the activities of the General Assembly (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, ICJ Reports 1950, page 70; *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996 (I), pages 232 and 233, paragraphs 11 and 12).

The Court will so proceed in the present case. The Court would observe that article 10 of the Charter has conferred upon the General Assembly a competence

relating to “any questions or any matters” within the scope of the Charter, and that article 11, paragraph 2, has specifically provided it with competence on “questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations” and to make recommendations under certain conditions fixed by those articles. As will be explained below, the question of the construction of the wall in the Occupied Palestinian Territory was brought before the General Assembly by a number of Member States in the context of the Tenth Emergency Special Session of the Assembly, convened to deal with what the Assembly, in its resolution ES-10/2 of 25 April 1997, considered to constitute a threat to international peace and security.

Before further examining the problems of jurisdiction that have been raised in the present proceedings, the Court considers it necessary to describe the events that led to the adoption of resolution ES-10/14, by which the General Assembly requested an advisory opinion on the legal consequences of the construction of the wall in the Occupied Palestinian Territory.

The Tenth Emergency Special Session of the General Assembly, at which that resolution was adopted, was first convened following the rejection by the Security Council, on 7 March and 21 March 1997, as a result of negative votes by a permanent member, of two draft resolutions concerning certain Israeli settlements in the Occupied Palestinian Territory (see, respectively, S/1997/199 and S/PV3747, and S/1997/241 and S/PV3756). By a letter of 31 March 1997, the Chairman of the Arab Group then requested “that an emergency special session of the General Assembly be convened pursuant to resolution 377A(V) entitled ‘Uniting for Peace’” with a view to discussing “Illegal Israeli actions in occupied East Jerusalem and the rest of the Occupied Palestinian Territory” (letter dated 31 March 1997 from the Permanent Representative of Qatar to the United Nations addressed to the Secretary-General, A/ES-10/1, 22 April 1997, Annex). The majority of Members of the United Nations having concurred in this request, the first meeting of the Tenth Emergency Special Session of the General Assembly took place on 24 April 1997 (see A/ES-10/1, 22 April 1997). Resolution ES-10/2 was adopted the following day; the General Assembly thereby expressed its conviction that:

“the repeated violation by Israel, the occupying Power, of international law and its failure to comply with relevant Security Council and General Assembly resolutions and the agreements reached between the parties undermine the Middle East peace process and constitute a threat to international peace and security”, and condemned the “illegal Israeli actions” in occupied East Jerusalem and the rest of the Occupied Palestinian Territory, in particular the construction of settlements in that territory. The Tenth Emergency Special session was then adjourned temporarily and has since been reconvened 11 times (on 15 July 1997, 13 November 1997, 17 March 1998, 5 February 1999, 18 October 2000, 20 December 2001, 7 May 2002, 5 August 2002, 19 September 2003, 20 October 2003 and 8 December 2003).

By a letter dated 9 October 2003, the Chairman of the Arab Group, on behalf of the States Members of the League of Arab States, requested an immediate meeting of the Security Council to consider the “grave and ongoing Israeli violations of international law, including international humanitarian law, and to take the necessary measures in this regard” (letter of 9 October 2003 from the Permanent Representative of the Syrian Arab Republic to the United Nations to the President of the Security Council, S/2003/973, 9 October 2003). This letter was accompanied by a draft resolution for consideration by the Council, which condemned as illegal the construction by Israel of a wall in the Occupied Palestinian Territory departing from the Armistice Line of 1949. The Security Council held its 4841st and 4842nd meetings on 14 October 2003 to consider the item entitled “The situation in the Middle East, including the Palestine question”. It then had before it another draft resolution proposed on the same day by Guinea, Malaysia, Pakistan and the Syrian Arab Republic, which also condemned the construction of the wall. This latter draft resolution was put to a vote after an open debate and was not adopted owing to the negative vote of a permanent member of the Council (S/PV4841 and S/PV4842).

On 15 October 2003, the Chairman of the Arab Group, on behalf of the States Members of the League of Arab States, requested the resumption of the Tenth Emergency Special Session of the General Assembly to consider the item of “Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory” (A/ES-0/242); this request was supported by the Non-Aligned Movement (A/ES-10/243) and the Organization of the Islamic Conference Group at the United Nations (A/ES-10/244). The Tenth Emergency Special Session resumed its work on 20 October 2003.

On 27 October 2003, the General Assembly adopted resolution ES-10/13, by which it demanded that “Israel stop and reverse the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, which is in departure of the Armistice Line of 1949 and is in contradiction to relevant provisions of international law” (paragraph 1). In paragraph 3, the Assembly requested the Secretary-General “to report on compliance with the resolution periodically, with the first report on compliance with paragraph 1 [of that resolution] to be submitted within one month”. The Tenth Emergency Special Session was temporarily adjourned and, on 24 November 2003, the report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/13 (hereinafter the “report of the Secretary-General”) was issued (A/ES-10/248).

Meanwhile, on 19 November 2003, the Security Council adopted resolution 1515 (2003), by which it “Endorse[d] the Quartet Performance-based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict”. The Quartet consists of representatives of the United States of America, the European Union, the Russian Federation and the United Nations. That resolution “Call[ed] on the

parties to fulfil their obligations under the Roadmap in cooperation with the Quartet and to achieve the vision of two States living side by side in peace and security”.

Neither the “Roadmap” nor resolution 1515 (2003) contained any specific provision concerning the construction of the wall, which was not discussed by the Security Council in this context.

Nineteen days later, on 8 December 2003, the Tenth Emergency Special Session of the General Assembly again resumed its work, following a new request by the Chairman of the Arab Group, on behalf of the States Members of the League of Arab States, and pursuant to resolution ES-10/13 (letter dated 1 December 2003 to the President of the General Assembly from the *Chargé d'affaires* *ai* of the Permanent Mission of Kuwait to the United Nations, A/ES-10/249, 2 December 2003). It was during the meeting convened on that day that resolution ES-10/14 requesting the present Advisory Opinion was adopted.

Having thus recalled the sequence of events that led to the adoption of resolution ES-10/14, the Court will now turn to the questions of jurisdiction that have been raised in the present proceedings. First, Israel has alleged that, given the active engagement of the Security Council with the situation in the Middle East, including the Palestinian question, the General Assembly acted *ultra vires* under the Charter when it requested an advisory opinion on the legal consequences of the construction of the wall in the Occupied Palestinian Territory.

The Court has already indicated that the subject of the present request for an advisory opinion falls within the competence of the General Assembly under the Charter (see paragraphs 15–17 above). However, article 12, paragraph 1, of the Charter provides that:

“While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.”

A request for an advisory opinion is not in itself a “recommendation” by the General Assembly “with regard to [a] dispute or situation”. It has however been argued in this case that the adoption by the General Assembly of resolution ES-10/14 was *ultra vires* as not in accordance with article 12. The Court thus considers that it is appropriate for it to examine the significance of that article, having regard to the relevant texts and the practice of the United Nations.

Under article 24 of the Charter the Security Council has “primary responsibility for the maintenance of international peace and security”. In that regard it can impose on States “an explicit obligation of compliance if for example it issues an order or command under Chapter VII” and can, to that end, “require

enforcement by coercive action” (Certain Expenses of the United Nations (article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, ICJ Reports 1962, page 163). However, the Court would emphasize that article 24 refers to a primary, but not necessarily exclusive, competence. The General Assembly does have the power, *inter alia*, under article 14 of the Charter, to “recommend measures for the peaceful adjustment” of various situations (Certain Expenses of the United Nations, (*ibid*), page 163). “[T]he only limitation which article 14 imposes on the General Assembly is the restriction found in article 12, namely, that the Assembly should not recommend measures while the Security Council is dealing with the same matter unless the Council requests it to do so.”(*Ibid*).

As regards the practice of the United Nations, both the General Assembly and the Security Council initially interpreted and applied article 12 to the effect that the Assembly could not make a recommendation on a question concerning the maintenance of international peace and security while the matter remained on the Council’s agenda.

Thus the Assembly during its fourth session refused to recommend certain measures on the question of Indonesia, on the ground, *inter alia*, that the Council remained seised of the matter (Official Records of the General Assembly, fourth session, Ad Hoc Political Committee, Summary Records of Meetings, 27 September–7 December 1949, 56th Meeting, 3 December 1949, page 339, paragraph 118). As for the Council, on a number of occasions it deleted items from its agenda in order to enable the Assembly to deliberate on them (for example, in respect of the Spanish question (Official Records of the Security Council, First Year: Second Series, number 21, 79th Meeting, 4 November 1946, page 498), in connection with incidents on the Greek border (Official Records of the Security Council, Second Year, number 89, 202nd Meeting, 15 September 1947, pages 2404–2405) and in regard to the Island of Taiwan (Formosa) (Official Records of the Security Council, Fifth Year, number 48, 506th Meeting, 29 September 1950, page 5)). In the case of the Republic of Korea, the Council decided on 31 January 1951 to remove the relevant item from the list of matters of which it was seised in order to enable the Assembly to deliberate on the matter (Official Records of the Security Council, Sixth Year, S/PV531, 531st Meeting, 31 January 1951, pages 11–12, paragraph 57).

However, this interpretation of article 12 has evolved subsequently. Thus the General Assembly deemed itself entitled in 1961 to adopt recommendations in the matter of the Congo (resolutions 1955 (XV) and 1600 (XVI)) and in 1963 in respect of the Portuguese colonies (resolution 1913 (XVIII)) while those cases still appeared on the Council’s agenda, without the Council having adopted any recent resolution concerning them. In response to a question posed by Peru during the Twenty-third session of the General Assembly, the Legal Counsel of the United Nations confirmed that the Assembly interpreted the words “is exercising the functions” in article 12 of the Charter as meaning “is exercising the functions at

this moment” (Twenty-third General Assembly, Third Committee, 1637th meeting, A/C3/SR1637, paragraph 9). Indeed, the Court notes that there has been an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security (see, for example, the matters involving Cyprus, South Africa, Angola, Southern Rhodesia and more recently Bosnia and Herzegovina and Somalia). It is often the case that, while the Security Council has tended to focus on the aspects of such matters related to international peace and security, the General Assembly has taken a broader view, considering also their humanitarian, social and economic aspects.

The Court considers that the accepted practice of the General Assembly, as it has evolved, is consistent with article 12, paragraph 1, of the Charter.

The Court is accordingly of the view that the General Assembly, in adopting resolution ES-10/14, seeking an advisory opinion from the Court, did not contravene the provisions of article 12, paragraph 1, of the Charter. The Court concludes that by submitting that request the General Assembly did not exceed its competence.

It has however been contended before the Court that the present request for an advisory opinion did not fulfil the essential conditions set by resolution 377A(V), under which the Tenth Emergency Special Session was convened and has continued to act. In this regard, it has been said, first, that “The Security Council was never seised of a draft resolution proposing that the Council itself should request an advisory opinion from the Court on the matters now in contention”, and, that specific issue having thus never been brought before the Council, the General Assembly could not rely on any inaction by the Council to make such a request. Secondly, it has been claimed that, in adopting resolution 1515 (2003), which endorsed the “Roadmap”, before the adoption by the General Assembly of resolution ES-10/14, the Security Council continued to exercise its responsibility for the maintenance of international peace and security and that, as a result, the General Assembly was not entitled to act in its place. The validity of the procedure followed by the Tenth Emergency Special Session, especially the session’s “rolling character” and the fact that its meeting was convened to deliberate on the request for the advisory opinion at the same time as the General Assembly was meeting in regular session, has also been questioned.

The Court would recall that resolution 377A(V) states that:

“if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures.

The procedure provided for by that resolution is premised on two conditions, namely that the Council has failed to exercise its primary responsibility for the maintenance of international peace and security as a result of a negative vote of one or more permanent members, and that the situation is one in which there appears to be a threat to the peace, breach of the peace, or act of aggression.

The Court must accordingly ascertain whether these conditions were fulfilled as regards the convening of the Tenth Emergency Special Session of the General Assembly, in particular at the time when the Assembly decided to request an advisory opinion from the Court.”

In the light of the sequence of events described in paragraphs 18 to 23 above, the Court observes that, at the time when the Tenth Emergency Special Session was convened in 1997, the Council had been unable to take a decision on the case of certain Israeli settlements in the Occupied Palestinian Territory, due to negative votes of a permanent member; and that, as indicated in resolution ES-10/2 (see paragraph 19 above), there existed a threat to international peace and security.

The Court further notes that, on 20 October 2003, the Tenth Emergency Special Session of the General Assembly was reconvened on the same basis as in 1997 (see the statements by the representatives of Palestine and Israel, A/ES-10/PV21, pages 2 and 5), after the rejection by the Security Council, on 14 October 2003, again as a result of the negative vote of a permanent member, of a draft resolution concerning the construction by Israel of the wall in the Occupied Palestinian Territory. The Court considers that the Security Council again failed to act as contemplated in resolution 377A(V). It does not appear to the Court that the situation in this regard changed between 20 October 2003 and 8 December 2003, since the Council neither discussed the construction of the wall nor adopted any resolution in that connection. Thus, the Court is of the view that, up to 8 December 2003, the Council had not reconsidered the negative vote of 14 October 2003. It follows that, during that period, the Tenth Emergency Special Session was duly reconvened and could properly be seised, under resolution 377A(V), of the matter now before the Court.

The Court would also emphasize that, in the course of this Emergency Special Session, the General Assembly could adopt any resolution falling within the subject-matter for which the Session had been convened, and otherwise within its powers, including a resolution seeking the Court's opinion. It is irrelevant in that regard that no proposal had been made to the Security Council to request such an opinion.

Turning now to alleged further procedural irregularities of the Tenth Emergency Special Session, the Court does not consider that the “rolling” character of that Session, namely the fact of its having been convened in April 1997 and reconvened 11 times since then, has any relevance with regard to the validity of the request by the General Assembly. The Court observes in that regard that the

Seventh Emergency Special Session of the General Assembly, having been convened on 22 July 1980, was subsequently reconvened four times (on 20 April 1982, 25 June 1982, 16 August 1982 and 24 September 1982), and that the validity of resolutions or decisions of the Assembly adopted under such circumstances was never disputed. Nor has the validity of any previous resolutions adopted during the Tenth Emergency Special Session been challenged.

The Court also notes the contention by Israel that it was improper to reconvene the Tenth Emergency Special Session at a time when the regular Session of the General Assembly was in progress. The Court considers that, while it may not have been originally contemplated that it would be appropriate for the General Assembly to hold simultaneous emergency and regular sessions, no rule of the Organization has been identified which would be thereby violated, so as to render invalid the resolution adopting the present request for an advisory opinion.

Finally, the Tenth Emergency Special Session appears to have been convened in accordance with Rule 9(b) of the Rules of Procedure of the General Assembly, and the relevant meetings have been convened in pursuance of the applicable rules. As the Court stated in its Advisory Opinion of 21 June 1971 concerning the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), a “resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ’s rules of procedure, and is declared by its President to have been so passed, must be presumed to have been validly adopted” (ICJ Reports 1971, page 22, paragraph 20). In view of the foregoing, the Court cannot see any reason why that presumption is to be rebutted in the present case.

The Court now turns to a further issue related to jurisdiction in the present proceedings, namely the contention that the request for an advisory opinion by the General Assembly is not on a “legal question” within the meaning of article 96, paragraph 1, of the Charter and article 65, paragraph 1, of the Statute of the Court. It has been contended in this regard that, for a question to constitute a “legal question” for the purposes of these two provisions, it must be reasonably specific, since otherwise it would not be amenable to a response by the Court. With regard to the request made in the present advisory proceedings, it has been argued that it is not possible to determine with reasonable certainty the legal meaning of the question asked of the Court for two reasons.

First, it has been argued that the question regarding the “legal consequences” of the construction of the wall only allows for two possible interpretations, each of which would lead to a course of action that is precluded for the Court. The question asked could first be interpreted as a request for the Court to find that the construction of the wall is illegal, and then to give its opinion on the legal consequences of that illegality. In this case, it has been contended, the Court

should decline to respond to the question asked for a variety of reasons, some of which pertain to jurisdiction and others rather to the issue of propriety.

As regards jurisdiction, it is said that, if the General Assembly had wished to obtain the view of the Court on the highly complex and sensitive question of the legality of the construction of the wall, it should have expressly sought an opinion to that effect (cf. *Exchange of Greek and Turkish Populations*, Advisory Opinion, 1925, PCIJ Series B, number 10, page 17). A second possible interpretation of the request, it is said, is that the Court should assume that the construction of the wall is illegal, and then give its opinion on the legal consequences of that assumed illegality. It has been contended that the Court should also decline to respond to the question on this hypothesis, since the request would then be based on a questionable assumption and since, in any event, it would be impossible to rule on the legal consequences of illegality without specifying the nature of that illegality.

Secondly, it has been contended that the question asked of the Court is not of a “legal” character because of its imprecision and abstract nature. In particular, it has been argued in this regard that the question fails to specify whether the Court is being asked to address legal consequences for “the General Assembly or some other organ of the United Nations”, “Member States of the United Nations”, “Israel”, “Palestine” or “some combination of the above, or some different entity”.

As regards the alleged lack of clarity of the terms of the General Assembly’s request and its effect on the “legal nature” of the question referred to the Court, the Court observes that this question is directed to the legal consequences arising from a given factual situation considering the rules and principles of international law, including the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (hereinafter the “Fourth Geneva Convention”) and relevant Security Council and General Assembly resolutions. The question submitted by the General Assembly has thus, to use the Court’s phrase in its Advisory Opinion on Western Sahara, “been framed in terms of law and raise[s] problems of international law”; it is by its very nature susceptible of a reply based on law; indeed it is scarcely susceptible of a reply otherwise than on the basis of law. In the view of the Court, it is indeed a question of a legal character (see *Western Sahara*, Advisory Opinion, ICJ Reports 1975, page 18, paragraph 15).

The Court would point out that lack of clarity in the drafting of a question does not deprive the Court of jurisdiction. Rather, such uncertainty will require clarification in interpretation, and such necessary clarifications of interpretation have frequently been given by the Court.

In the past, both the Permanent Court and the present Court have observed in some cases that the wording of a request for an advisory opinion did not accurately state the question on which the Court’s opinion was being sought (*Interpretation of the Greco-Turkish Agreement of 1 December 1926* (Final Protocol, article IV), Advisory Opinion, 1928, PCIJ Series B, number 16(I), pages 14–16), or did not

correspond to the “true legal question” under consideration (Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, ICJ Reports 1980, pages 87–89, paragraphs 34–36). The Court noted in one case that “the question put to the Court is, on the face of it, at once infelicitously expressed and vague” (Application for Review of Judgement number 273 of the United Nations Administrative Tribunal, Advisory Opinion, ICJ Reports 1982, page 348, paragraph 46).

Consequently, the Court has often been required to broaden, interpret and even reformulate the questions put (see the three Opinions cited above; see also *Jaworzina*, Advisory Opinion, 1923, PCIJ Series B, number 8; *Admissibility of Hearings of Petitioners by the Committee on South West Africa*, Advisory Opinion, ICJ Reports 1956, page 25; *Certain Expenses of the United Nations* (article 17, paragraph 2, of the Charter), Advisory Opinion, ICJ Reports 1962, pages 157–162).

In the present instance, the Court will only have to do what it has often done in the past, namely “identify the existing principles and rules, interpret them and apply them thus offering a reply to the question posed based on law” (*Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996 (I), page 234, paragraph 13).

In the present instance, if the General Assembly requests the Court to state the “legal consequences” arising from the construction of the wall, the use of these terms necessarily encompasses an assessment of whether that construction is or is not in breach of certain rules and principles of international law. Thus, the Court is first called upon to determine whether such rules and principles have been and are still being breached by the construction of the wall along the planned route.

The Court does not consider that what is contended to be the abstract nature of the question posed to it raises an issue of jurisdiction. Even when the matter was raised as an issue of propriety rather than one of jurisdiction, in the case concerning the *Legality of the Threat or Use of Nuclear Weapons*, the Court took the position that to contend that it should not deal with a question couched in abstract terms is “a mere affirmation devoid of any justification” and that “the Court may give an advisory opinion on any legal question, abstract or otherwise” (ICJ Reports 1996 (I), page 236, paragraph 15, referring to *Conditions of Admission of a State to Membership in the United Nations* (article 4 of the Charter), Advisory Opinion, 1948, ICJ Reports 1947–1948, page 61; *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Reports 1954, page 51; and *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971, page 27, paragraph 40). In any event, the Court considers that the question posed to it in relation to the legal consequences of the construction of the wall is not an abstract one, and

moreover that it would be for the Court to determine for whom any such consequences arise.

Furthermore, the Court cannot accept the view, which has also been advanced in the present proceedings, that it has no jurisdiction because of the “political” character of the question posed. As is clear from its long-standing jurisprudence on this point, the Court considers that the fact that a legal question also has political aspects, “as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a ‘legal question’ and to ‘deprive the Court of a competence expressly conferred on it by its Statute’ (Application for Review of Judgement number 158 of the United Nations Administrative Tribunal, Advisory Opinion, ICJ Reports 1973, page 172, paragraph 14). Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them by international law (cf Conditions of Admission of a State to Membership in the United Nations (article 4 of the Charter), Advisory Opinion, 1948, ICJ Reports 1947-1948, pages 61-62; Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, ICJ Reports 1950, pages 6-7; Certain Expenses of the United Nations (article 17, paragraph 2, of the Charter), Advisory Opinion, ICJ Reports 1962, page 155).” (Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996 (I), page 234, paragraph 13).

In its Opinion concerning the Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, the Court indeed emphasized that, “in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate” (ICJ Reports 1980, page 87, paragraph 286. Moreover, the Court has affirmed in its Opinion on the Legality of the Threat or Use of Nuclear Weapons that “the political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have are of no relevance in the establishment of its jurisdiction to give such an opinion” (ICJ Reports 1996 (I), page 234, paragraph 13). The Court is of the view that there is no element in the present proceedings which could lead it to conclude otherwise.

The Court accordingly has jurisdiction to give the advisory opinion requested by resolution ES-10/14 of the General Assembly.

It has been contended in the present proceedings, however, that the Court should decline to exercise its jurisdiction because of the presence of specific aspects of the General Assembly’s request that would render the exercise of the Court’s jurisdiction improper and inconsistent with the Court’s judicial function.

The Court has recalled many times in the past that article 65, paragraph 1, of its Statute, which provides that “The Court may give an advisory opinion”, should be interpreted to mean that the Court has a discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met (*Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996 (I), page 234, paragraph 14). The Court however is mindful of the fact that its answer to a request for an advisory opinion “represents its participation in the activities of the Organization, and, in principle, should not be refused” (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase*, Advisory Opinion, ICJ Reports 1950, page 71; see also, for example, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights*, Advisory Opinion, ICJ Reports 1999 (I), pages 78–79, paragraph 29).

Given its responsibilities as the “principal judicial organ of the United Nations” (article 92 of the Charter), the Court should in principle not decline to give an advisory opinion.

In accordance with its consistent jurisprudence, only “compelling reasons” should lead the Court to refuse its opinion (*Certain Expenses of the United Nations* (article 17, paragraph 2, of the Charter), Advisory Opinion, ICJ Reports 1962, page 155; see also, for example, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights*, Advisory Opinion, ICJ Reports 1999 (I), pages 78–79, paragraph 29).

The present Court has never, in the exercise of this discretionary power, declined to respond to a request for an advisory opinion. Its decision not to give the advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* requested by the World Health Organization was based on the Court’s lack of jurisdiction, and not on considerations of judicial propriety (see ICJ Reports 1996 (I), page 235, paragraph 14). Only on one occasion did the Court’s predecessor, the Permanent Court of International Justice, take the view that it should not reply to a question put to it (*Status of Eastern Carelia*, Advisory Opinion, 1923, PCIJ Series B, number 5), but this was due to “the very particular circumstances of the case, among which were that the question directly concerned an already existing dispute, one of the States parties to which was neither a party to the Statute of the Permanent Court nor a Member of the League of Nations, objected to the proceedings, and refused to take part in any way” (*Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996 (I), pages 235–236, paragraph 14).

These considerations do not release the Court from the duty to satisfy itself, each time it is seised of a request for an opinion, as to the propriety of the exercise of its judicial function, by reference to the criterion of “compelling reasons” as cited above. The Court will accordingly examine in detail and in the light of its jurisprudence each of the arguments presented to it in this regard.

The first such argument is to the effect that the Court should not exercise its jurisdiction in the present case because the request concerns a contentious matter between Israel and Palestine, in respect of which Israel has not consented to the exercise of that jurisdiction. According to this view, the subject-matter of the question posed by the General Assembly “is an integral part of the wider Israeli-Palestinian dispute concerning questions of terrorism, security, borders, settlements, Jerusalem and other related matters”. Israel has emphasized that it has never consented to the settlement of this wider dispute by the Court or by any other means of compulsory adjudication; on the contrary, it contends that the parties repeatedly agreed that these issues are to be settled by negotiation, with the possibility of an agreement that recourse could be had to arbitration.

It is accordingly contended that the Court should decline to give the present Opinion, on the basis *inter alia* of the precedent of the decision of the Permanent Court of International Justice on the Status of Eastern Carelia.

The Court observes that the lack of consent to the Court’s contentious jurisdiction by interested States has no bearing on the Court’s jurisdiction to give an advisory opinion. In an Advisory Opinion of 1950, the Court explained that:

“The consent of States, parties to a dispute, is the basis of the Court’s jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States.”

The Court’s reply is only of an advisory character: as such, it has no binding force. It follows that no State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take. The Court’s Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an ‘organ of the United Nations’, represents its participation in the activities of the Organization, and, in principle, should not be refused.” (Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, ICJ Reports 1950, page 71; see also Western Sahara, ICJ Reports 1975, page 24, paragraph 31).

It followed from this that, in those proceedings, the Court did not refuse to respond to the request for an advisory opinion on the ground that, in the particular circumstances, it lacked jurisdiction.

The Court did however examine the opposition of certain interested States to the request by the General Assembly in the context of issues of judicial propriety. Commenting on its 1950 decision, the Court explained in its Advisory Opinion on Western Sahara that it had “Thus recognized that lack of consent might constitute a ground for declining to give the opinion requested if, in the circumstances of a given case, considerations of judicial propriety should oblige the Court to refuse an opinion.” The Court continued:

“In certain circumstances the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court’s judicial character. An instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent.” (Western Sahara, ICJ Reports 1975, page 25, paragraphs 32–33.)

In applying that principle to the request concerning Western Sahara, the Court found that a legal controversy did indeed exist, but one which had arisen during the proceedings of the General Assembly and in relation to matters with which the Assembly was dealing. It had not arisen independently in bilateral relations.”(*ibid* page 25, paragraph 34).

As regards the request for an advisory opinion now before it, the Court acknowledges that Israel and Palestine have expressed radically divergent views on the legal consequences of Israel’s construction of the wall, on which the Court has been asked to pronounce. However, as the Court has itself noted, “Differences of views on legal issues have existed in practically every advisory proceeding” (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971, page 24, paragraph 34).

Furthermore, the Court does not consider that the subject-matter of the General Assembly’s request can be regarded as only a bilateral matter between Israel and Palestine. Given the powers and responsibilities of the United Nations in questions relating to international peace and security, it is the Court’s view that the construction of the wall must be deemed to be directly of concern to the United Nations. The responsibility of the United Nations in this matter also has its origin in the Mandate and the Partition Resolution concerning Palestine (see paragraphs 70 and 71 below). This responsibility has been described by the General Assembly as “a permanent responsibility towards the question of Palestine until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy” (General Assembly resolution 57/107 of 3 December 2002). Within the institutional framework of the Organization, this responsibility has been manifested by the adoption of many Security Council and General Assembly resolutions, and by the creation of several subsidiary bodies specifically established to assist in the realization of the inalienable rights of the Palestinian people.

The object of the request before the Court is to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions. The opinion is requested on a question which is of particularly acute concern to the United Nations, and one which is located in a much broader frame of reference than a bilateral dispute. In the circumstances, the Court does not consider that to give an opinion would have the effect of circumventing the principle of consent to judicial settlement, and the Court

accordingly cannot, in the exercise of its discretion, decline to give an opinion on that ground.

The Court now turns to another argument raised in the present proceedings in support of the view that it should decline to exercise its jurisdiction. Some participants have argued that an advisory opinion from the Court on the legality of the wall and the legal consequences of its construction could impede a political, negotiated solution to the Israeli-Palestinian conflict. More particularly, it has been contended that such an opinion could undermine the scheme of the “Roadmap” (see paragraph 22 above), which requires Israel and Palestine to comply with certain obligations in various phases referred to therein. The requested opinion, it has been alleged, could complicate the negotiations envisaged in the “Roadmap”, and the Court should therefore exercise its discretion and decline to reply to the question put.

This is a submission of a kind which the Court has already had to consider several times in the past. For instance, in its Advisory opinion on the Legality of the Threat or Use of Nuclear Weapons, the Court stated:

“It has been submitted that a reply from the Court in this case might adversely affect disarmament negotiations and would, therefore, be contrary to the interest of the United Nations. The Court is aware that, no matter what might be its conclusions in any opinion it might give, they would have relevance for the continuing debate on the matter in the General Assembly and would present an additional element in the negotiations on the matter. Beyond that, the effect of the opinion is a matter of appreciation. The Court has heard contrary positions advanced and there are no evident criteria by which it can prefer one assessment to another.” (ICJ Reports 1996 (I), page 237, paragraph 17; see also *Western Sahara*, ICJ Reports 1975, page 37, paragraph 73.)

One participant in the present proceedings has indicated that the Court, if it were to give a response to the request, should in any event do so keeping in mind “two key aspects of the peace process: the fundamental principle that permanent status issues must be resolved through negotiations; and the need during the interim period for the parties to fulfill their security responsibilities so that the peace process can succeed”.

The Court is conscious that the “Roadmap”, which was endorsed by the Security Council in resolution 1515 (2003) (see paragraph 22 above), constitutes a negotiating framework for the resolution of the Israeli-Palestinian conflict. It is not clear, however, what influence the Court’s opinion might have on those negotiations: participants in the present proceedings have expressed differing views in this regard. The Court cannot regard this factor as a compelling reason to decline to exercise its jurisdiction.

It was also put to the Court by certain participants that the question of the construction of the wall was only one aspect of the Israeli-Palestinian conflict,

which could not be properly addressed in the present proceedings. The Court does not however consider this a reason for it to decline to reply to the question asked. The Court is indeed aware that the question of the wall is part of a greater whole, and it would take this circumstance carefully into account in any opinion it might give. At the same time, the question that the General Assembly has chosen to ask of the Court is confined to the legal consequences of the construction of the wall, and the Court would only examine other issues to the extent that they might be necessary to its consideration of the question put to it.

Several participants in the proceedings have raised the further argument that the Court should decline to exercise its jurisdiction because it does not have at its disposal the requisite facts and evidence to enable it to reach its conclusions. In particular, Israel has contended, referring to the Advisory Opinion on the Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, that the Court could not give an opinion on issues which raise questions of fact that cannot be elucidated without hearing all parties to the conflict. According to Israel, if the Court decided to give the requested opinion, it would be forced to speculate about essential facts and make assumptions about arguments of law. More specifically, Israel has argued that the Court could not rule on the legal consequences of the construction of the wall without enquiring, first, into the nature and scope of the security threat to which the wall is intended to respond and the effectiveness of that response, and, second, into the impact of the construction for the Palestinians.

This task, which would already be difficult in a contentious case, would be further complicated in an advisory proceeding, particularly since Israel alone possesses much of the necessary information and has stated that it chooses not to address the merits. Israel has concluded that the Court, confronted with factual issues impossible to clarify in the present proceedings, should use its discretion and decline to comply with the request for an advisory opinion.

The Court observes that the question whether the evidence available to it is sufficient to give an advisory opinion must be decided in each particular instance. In its Opinion concerning the Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (ICJ Reports 1950, page 72) and again in its Opinion on the Western Sahara, the Court made it clear that what is decisive in these circumstances is “whether the Court has before it sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character” (Western Sahara, ICJ Reports 1975, pages 28-29, paragraph 46). Thus, for instance, in the proceedings concerning the Status of Eastern Carelia, the Permanent Court of International Justice decided to decline to give an Opinion *inter alia* because the question put “raised a question of fact which could not be elucidated without hearing both parties” (Interpretation of Peace Treaties with Bulgaria, Hungary and Romania,

ICJ Reports 1950, page 72; see Status of Eastern Carelia, PCIJ Series B, number 5, page 28). On the other hand, in the Western Sahara Opinion, the Court observed that it had been provided with very extensive documentary evidence of the relevant facts (ICJ Reports 1975, page 29, paragraph 47).

In the present instance, the Court has at its disposal the report of the Secretary-General, as well as a voluminous dossier submitted by him to the Court, comprising not only detailed information on the route of the wall but also on its humanitarian and socioeconomic impact on the Palestinian population. The dossier includes several reports based on on-site visits by special rapporteurs and competent organs of the United Nations. The Secretary-General has further submitted to the Court a written statement updating his report, which supplemented the information contained therein. Moreover, numerous other participants have submitted to the Court written statements which contain information relevant to a response to the question put by the General Assembly. The Court notes in particular that Israel's Written Statement, although limited to issues of jurisdiction and judicial propriety, contained observations on other matters, including Israel's concerns in terms of security, and was accompanied by corresponding annexes; many other documents issued by the Israeli Government on those matters are in the public domain.

The Court finds that it has before it sufficient information and evidence to enable it to give the advisory opinion requested by the General Assembly. Moreover, the circumstance that others may evaluate and interpret these facts in a subjective or political manner can be no argument for a court of law to abdicate its judicial task. There is therefore in the present case no lack of information such as to constitute a compelling reason for the Court to decline to give the requested opinion.

In their written statements, some participants have also put forward the argument that the Court should decline to give the requested opinion on the legal consequences of the construction of the wall because such opinion would lack any useful purpose. They have argued that the advisory opinions of the Court are to be seen as a means to enable an organ or agency in need of legal clarification for its future action to obtain that clarification. In the present instance, the argument continues, the General Assembly would not need an opinion of the Court because it has already declared the construction of the wall to be illegal and has already determined the legal consequences by demanding that Israel stop and reverse its construction, and further, because the General Assembly has never made it clear how it intended to use the opinion.

As is clear from the Court's jurisprudence, advisory opinions have the purpose of furnishing to the requesting organs the elements of law necessary for them in their action.

In its Opinion concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, the Court observed: "The object of this request for an Opinion is to guide the United Nations in respect of its own action." (ICJ Reports 1951, page 19). Likewise, in its Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), the Court noted: "The request is put forward by a United Nations organ with reference to its own decisions and it seeks legal advice from the Court on the consequences and implications of these decisions." (ICJ Reports 1971, page 24, paragraph 32). The Court found on another occasion that the advisory opinion it was to give would "furnish the General Assembly with elements of a legal character relevant to its further treatment of the decolonization of Western Sahara" (Western Sahara, ICJ Reports 1975, paraw 37, paragraph 72).

With regard to the argument that the General Assembly has not made it clear what use it would make of an advisory opinion on the wall, the Court would recall, as equally relevant in the present proceedings, what it stated in its Opinion on the Legality of the Threat or Use of Nuclear Weapons:

"Certain States have observed that the General Assembly has not explained to the Court for what precise purposes it seeks the advisory opinion. Nevertheless, it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs." (ICJ Reports 1996 (I), page 237, paragraph 16).

It follows that the Court cannot decline to answer the question posed based on the ground that its opinion would lack any useful purpose. The Court cannot substitute its assessment of the usefulness of the opinion requested for that of the organ that seeks such opinion, namely the General Assembly. Furthermore, and in any event, the Court considers that the General Assembly has not yet determined all the possible consequences of its own resolution. The Court's task would be to determine in a comprehensive manner the legal consequences of the construction of the wall, while the General may then draw conclusions from the Court's and the Security Council Assembly findings.

Lastly, the Court will turn to another argument advanced with regard to the propriety of its giving an advisory opinion in the present proceedings. Israel has contended that Palestine, given its responsibility for acts of violence against Israel and its population which the wall is aimed at addressing, cannot seek from the Court a remedy for a situation resulting from its own wrongdoing.

In this context, Israel has invoked the *maxim nullus commodum capere potest de sua injuria propria*, which it considers to be as relevant in advisory proceedings as it is in contentious cases.

Therefore, Israel concludes, good faith and the principle of “clean hands” provide a compelling reason that should lead the Court to refuse the General Assembly’s request.

The Court does not consider this argument to be pertinent. As was emphasized earlier, it was the General Assembly which requested the advisory opinion, and the opinion is to be given to the General Assembly, and not to a specific State or entity.

In the light of the foregoing, the Court concludes not only that it has jurisdiction to give an opinion on the question put to it by the General Assembly (see paragraph 42 above), but also that there is no compelling reason for it to use its discretionary power not to give that opinion.

The Court will now address the question put to it by the General Assembly in resolution ES-10/14. The Court recalls that the question is as follows:

“What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?”

As explained in paragraph 82 below, the “wall” in question is a complex construction, so that that term cannot be understood in a limited physical sense. However, the other terms used, either by Israel (“fence”) or by the Secretary-General (“barrier”), are no more accurate if understood in the physical sense. In this Opinion, the Court has therefore chosen to use the terminology employed by the General Assembly.

The Court notes furthermore that the request of the General Assembly concerns the legal consequences of the wall being built “in the Occupied Palestinian Territory, including in and around East Jerusalem”. As also explained below (see paragraphs 79–84 below), some parts of the complex are being built, or are planned to be built, on the territory of Israel itself; the Court does not consider that it is called upon to examine the legal consequences arising from the construction of those parts of the wall.

The question put by the General Assembly concerns the legal consequences of the construction of the wall in the Occupied Palestinian Territory. However, in order to indicate those consequences to the General Assembly the Court must first determine whether or not the construction of that wall breaches international law (see paragraph 39 above). It will therefore make this determination before dealing with the consequences of the construction.

To do so, the Court will first make a brief analysis of the status of the territory concerned, and will then describe the works already constructed or in course of

construction in that territory. It will then indicate the applicable law before seeking to establish whether that law has been breached.

Palestine was part of the Ottoman Empire. At the end of the First World War, a class “A” Mandate for Palestine was entrusted to Great Britain by the League of Nations, pursuant to paragraph 4 of article 22 of the Covenant, which provided that: “Certain communities, formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone”.

The Court recalls that in its Advisory Opinion on the International Status of South West Africa, speaking of mandates in general, it observed that “The Mandate was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with a sacred trust of civilization.” (An international object – ICJ Reports 1950, page 132). The Court also held in this regard that “two principles were considered to be of paramount importance: the principle of non-annexation and the principle that the well-being and development of peoples [not yet able to govern themselves] form[ed] ‘a sacred trust of civilization’” (*ibid* page 131).

The territorial boundaries of the Mandate for Palestine were laid down by various instruments, in particular on the eastern border by a British memorandum of 16 September 1922 and an Anglo-Transjordanian Treaty of 20 February 1928.

The Court would observe that, under customary international law as reflected (see paragraph 89 below) in article 42 of the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907 (hereinafter “the Hague Regulations of 1907”), territory is considered occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised.

The territories situated between the Green Line (see paragraph 72 above) and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power.

Subsequent events in these territories, as described in paragraphs 75 to 77 above, have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power.

It is essentially in these territories that Israel has constructed or plans to construct the works described in the report of the Secretary-General. The Court

will now describe those works, basing itself on that report. For developments subsequent to the publication of that report, the Court will refer to complementary information contained in the Written Statement of the United Nations, which was intended by the Secretary-General to supplement his report (hereinafter “Written Statement of the Secretary-General”).

According to the description in the report and the Written Statement of the Secretary-General, the works planned or completed have resulted or will result in a complex consisting essentially of:

- (1) a fence with electronic sensors;
- (2) a ditch (up to 4 metres deep);
- (3) a two-lane asphalt patrol road;
- (4) a trace road (a strip of sand smoothed to detect footprints) running parallel to the fence;
- (5) a stack of six coils of barbed wire marking the perimeter of the complex...

Access to and exit from the Closed Area can only be made through access gates, which are opened infrequently and for short periods.

The Court will now determine the rules and principles of international law which are relevant in assessing the legality of the measures taken by Israel. Such rules and principles can be found in the United Nations Charter and certain other treaties, in customary international law and in the relevant resolutions adopted pursuant to the Charter by the General Assembly and the Security Council. However, doubts have been expressed by Israel as to the applicability in the Occupied Palestinian Territory of certain rules of international humanitarian law and human rights instruments. The Court will now consider these various questions.

The Court first recalls that, pursuant to article 2, paragraph 4, of the United Nations Charter:

“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.”

On 24 October 1970, the General Assembly adopted resolution 2625 (XXV), entitled “Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States” (hereinafter “resolution 2625 (XXV)”), in which it emphasized that “No territorial acquisition resulting from the threat or use of force shall be recognized as legal.” As the Court stated in its Judgment in the case concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v United States of America*), the principles as to the use of force incorporated in the Charter reflect customary international law (see ICJ Reports

1986, pages 98-101, paragraphs 187-190); the same is true of its corollary entailing the illegality of territorial acquisition resulting from the threat or use of force.

The Court also notes that the principle of self-determination of peoples has been enshrined in the United Nations Charter and reaffirmed by the General Assembly in resolution 2625 (XXV) cited above, pursuant to which “Every State has the duty to refrain from any forcible action which deprives peoples referred to [in that resolution] of their right to self-determination.” article 1 common to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights reaffirms the right of all peoples to self-determination, and lays upon the States parties the obligation to promote the realization of that right and to respect it, in conformity with the provisions of the United Nations Charter.

The Court would recall that in 1971 it emphasized that current developments in “international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all [such territories]”. The Court went on to state that “These developments leave little doubt that the ultimate objective of the sacred trust” referred to in article 22, paragraph 1, of the Covenant of the League of Nations “was the self-determination of the peoples concerned” (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971, page 31, paragraphs 52-53). The Court has referred to this principle on a number of occasions in its jurisprudence (*ibid* see also Western Sahara, Advisory Opinion, ICJ Reports 1975, page 68, paragraph 162). The Court indeed made it clear that the right of peoples to self-determination is today a right *erga omnes* (see East Timor (*Portugal v Australia*), Judgment, ICJ Reports 1995, page 102, paragraph 29).

As regards international humanitarian law, the Court would first note that Israel is not a party to the Fourth Hague Convention of 1907, to which the Hague Regulations are annexed. The Court observes that, in the words of the Convention, those Regulations were prepared “to revise the general laws and customs of war” existing at that time. Since then, however, the International Military Tribunal of Nuremberg has found that the “rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war” (Judgment of the International Military Tribunal of Nuremberg, 30 September and 1 October 1946, page 65). The Court itself reached the same conclusion when examining the rights and duties of belligerents in their conduct of military operations (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996 (I), page 256, paragraph 75). The Court considers that the provisions of the Hague Regulations have

become part of customary law, as is in fact recognized by all the participants in the proceedings before the Court.

The Court also observes that, pursuant to article 154 of the Fourth Geneva Convention, that Convention is supplementary to Sections II and III of the Hague Regulations. Section III of those Regulations, which concerns “Military authority over the territory of the hostile State”, is particularly pertinent in the present case.

Secondly, with regard to the Fourth Geneva Convention, differing views have been expressed by the participants in these proceedings. Israel, contrary to the great majority of the other participants, disputes the applicability *de jure* of the Convention to the Occupied Palestinian Territory. In particular, in paragraph 3 of Annex I to the report of the Secretary-General, entitled “Summary Legal Position of the Government of Israel”, it is stated that Israel does not agree that the Fourth Geneva Convention “is applicable to the occupied Palestinian Territory”, citing “the lack of recognition of the territory as sovereign prior to its annexation by Jordan and Egypt” and inferring that it is “not a territory of a High Contracting Party as required by the Convention”.

The Court would recall that the Fourth Geneva Convention was ratified by Israel on 6 July 1951 and that Israel is a party to that Convention. Jordan has also been a party thereto since 29 May 1951. Neither of the two States has made any reservation that would be pertinent to the present proceedings.

Furthermore, Palestine gave a unilateral undertaking, by declaration of 7 June 1982, to apply the Fourth Geneva Convention. Switzerland, as depositary State, considered that unilateral undertaking in as a depositary valid. It concluded, however, that it “[was] not position to decide whether” “the request [dated 14 June 1989] from the Palestine Liberation Movement in the name of the ‘State of Palestine’ to accede” *inter alia* to the Fourth Geneva Convention “can be considered as an instrument of accession”.

Moreover, for the purpose of determining the scope of application of the Fourth Geneva Convention, it should be recalled that under common article 2 of the four Conventions of 12 August 1949:

“In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations.

They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.”

After the occupation of the West Bank in 1967, the Israeli authorities issued an order number 3 stating in its article 35 that:

“the Military Court must apply the provisions of the Geneva Convention dated 12 August 1949 relative to the Protection of Civilian Persons in Time of War with respect to judicial procedures. In case of conflict between this Order and the said Convention, the Convention shall prevail.”

Subsequently, the Israeli authorities have indicated on a number of occasions that in fact they generally apply the humanitarian provisions of the Fourth Geneva Convention within the occupied territories. However, according to Israel’s position as briefly recalled in paragraph 90 above, that Convention is not applicable *de jure* within those territories because, under article 2, paragraph 2, it applies only in the case of occupation of territories falling under the sovereignty of a High Contracting Party involved in an armed conflict. Israel explains that Jordan was admittedly a party to the Fourth Geneva Convention in 1967, and that an armed conflict broke out at that time between Israel and Jordan, but it goes on to observe that the territories occupied by Israel subsequent to that conflict had not previously fallen under Jordanian sovereignty. It infers from this that that Convention is not applicable *de jure* in those territories. According however to the great majority of other participants in the proceedings, the Fourth Geneva Convention is applicable to those territories pursuant to article 2, paragraph 1, whether or not Jordan had any rights in respect thereof prior to 1967.

The Court would recall that, according to customary international law as expressed in article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Article 32 provides that:

“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 leaves the meaning ambiguous or obscure; or leads to a result which is manifestly obscure or unreasonable.” (See *Oil Platforms (Islamic Republic of Iran v United States of America)*, Preliminary Objections, ICJ Reports 1996 (II), page 812, paragraph 23; see, similarly, *Kasikili/Sedudu Island (Botswana/Namibia)*, ICJ Reports 1999 (II), page 1059, paragraph 18, and *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, ICJ Reports 2002, page 645, paragraph 37.)

The Court notes that, according to the first paragraph of article 2 of the Fourth Geneva Convention, that Convention is applicable when two conditions are

fulfilled: that there exists an armed conflict (whether or not a state of war has been recognized); and that the conflict has arisen between two contracting parties. If those two conditions are satisfied, the Convention applies, in particular, in any territory occupied in the course of the conflict by one of the contracting parties.

The object of the second paragraph of article 2 is not to restrict the scope of application of the Convention, as defined by the first paragraph, by excluding therefrom territories not falling under the sovereignty of one of the contracting parties. It is directed simply to making it clear that, even if occupation effected during the conflict met no armed resistance, the Convention is still applicable.

This interpretation reflects the intention of the drafters of the Fourth Geneva Convention to protect civilians who find themselves, in whatever way, in the hands of the occupying Power.

Whilst the drafters of the Hague Regulations of 1907 were as much concerned with protecting the rights of a State whose territory is occupied, as with protecting the inhabitants of that territory, the drafters of the Fourth Geneva Convention sought to guarantee the protection of civilians in time of war, regardless of the status of the occupied territories, as is shown by article 47 of the Convention.

That interpretation is confirmed by the Convention's travaux préparatoires. The Conference of Government Experts convened by the International Committee of the Red Cross (hereinafter, "ICRC") in the aftermath of the Second World War for the purpose of preparing the new Geneva Conventions recommended that these conventions be applicable to any armed conflict "whether [it] is or is not recognized as a state of war by the parties" and "in cases of occupation of territories in the absence of any state of war" (Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims, Geneva, 14-26 April 1947, page 8).

The drafters of the second paragraph of article 2 thus had no intention, when they inserted that paragraph into the Convention, of restricting the latter's scope of application. They were merely seeking to provide for cases of occupation without combat, such as the occupation of Bohemia and Moravia by Germany in 1939.

The Court would moreover note that the States parties to the Fourth Geneva Convention approved that interpretation at their Conference on 15 July 1999. They issued a statement in which they "reaffirmed the applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, including East Jerusalem". Subsequently, on 5 December 2001, the High Contracting Parties, referring in particular to article 1 of the Fourth Geneva Convention of 1949, once again reaffirmed the "applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, including East Jerusalem". They further reminded the Contracting Parties participating in the Conference, the parties to the conflict, and the State of Israel as occupying Power, of their respective obligations.

Moreover, the Court would observe that the ICRC, whose special position with respect to execution of the Fourth Geneva Convention must be “recognized and respected at all times” by the parties pursuant to article 142 of the Convention, has also expressed its opinion on the interpretation to be given to the Convention. In a declaration of 5 December 2001, it recalled that “the ICRC has always affirmed the *de jure* applicability of the Fourth Geneva Convention to the territories occupied since 1967 by the State of Israel, including East Jerusalem”.

The Court notes that the General Assembly has, in many of its resolutions, taken a position to the same effect. Thus on 10 December 2001 and 9 December 2003, in resolutions 56/60 and 58/97, it reaffirmed “that the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, is applicable to the Occupied Palestinian Territory, including East Jerusalem, and other Arab territories occupied by Israel since 1967”.

The Security Council, for its part, had already on 14 June 1967 taken the view in resolution 237 (1967) that “all the obligations of the Geneva Convention relative to the Treatment of Prisoners of War should be complied with by the parties involved in the conflict”.

Subsequently, on 15 September 1969, the Security Council, in resolution 271 (1969), called upon “Israel scrupulously to observe the provisions of the Geneva Conventions and international law governing military occupation”.

Ten years later, the Security Council examined “the policy and practices of Israel in establishing settlements in the Palestinian and other Arab territories occupied since 1967”. In resolution 446 (1979) of 22 March 1979, the Security Council considered that those settlements had “no legal validity” and affirmed “once more that the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, is applicable to the Arab territories occupied by Israel since 1967, including Jerusalem”. It called “once more upon Israel, as the occupying Power, to abide scrupulously” by that Convention.

On 20 December 1990, the Security Council, in resolution 681 (1990), urged “the Government of Israel to accept the *de jure* applicability of the Fourth Geneva Convention to all the territories occupied by Israel since 1967 and to abide scrupulously by the provisions of the Convention”. It further called upon “the high contracting parties to the said Fourth Geneva Convention to ensure respect by Israel, the occupying Power, for its obligations under the Convention in accordance with article 1 thereof”.

Lastly, in resolutions 799 (1992) of 18 December 1992 and 904 (1994) of 18 March 1994, the Security Council reaffirmed its position concerning the applicability of the Fourth Geneva Convention in the occupied territories.

The Court would note finally that the Supreme Court of Israel, in a judgment dated 30 May 2004, also found that:

“The military operations of the [Israeli defence Forces] in Rafah, to the extent they affect civilians, are governed by Hague Convention IV Respecting the Laws and Customs of War on Land 1907 and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949.”

In view of the foregoing, the Court considers that the Fourth Geneva Convention is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties. Israel and Jordan were parties to that Convention when the 1967 armed conflict broke out. The Court accordingly finds that that Convention is applicable in the Palestinian territories which before the conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of those territories.

The participants in the proceedings before the Court also disagree whether the international human rights conventions to which Israel is party apply within the Occupied Palestinian Territory. Annex I to the report of the Secretary-General states:

“(4) Israel denies that the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of which it has signed, are applicable to the occupied Palestinian territory. It asserts that humanitarian law is the protection granted in a conflict situation such as the one in the West Bank and Gaza Strip, whereas human rights treaties were intended for the protection of citizens from their own Government in times of peace.

Of the other participants in the proceedings, those who addressed this issue contend that, on the contrary, both Covenants are applicable within the Occupied Palestinian Territory.”

On 3 October 1991 Israel ratified both the International Covenant on Economic, Social and Cultural Rights of 19 December 1966 and the International Covenant on Civil and Political Rights of the same date, as well as the United Nations Convention on the Rights of the Child of 20 November 1989. It is a party to these three instruments.

In order to determine whether these texts are applicable in the Occupied Palestinian Territory, the Court will first address the issue of the relationship between international humanitarian law and human rights law and then that of the applicability of human rights instruments outside national territory.

In its Advisory Opinion of 8 July 1996 on the Legality of the Threat or Use of Nuclear Weapons, the Court had occasion to address the first of these issues in relation to the International Covenant on Civil and Political Rights. In those

proceedings certain States had argued that “the Covenant was directed to the protection of human rights in peacetime, but that questions relating to unlawful loss of life in hostilities were governed by the law applicable in armed conflict” (ICJ Reports 1996 (I), page 239, paragraph 24).

The Court rejected this argument, stating that:

“the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.” (*Ibid* page 240, paragraph 25.)

More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.

It remains to be determined whether the two international Covenants and the Convention on the Rights of the Child are applicable only on the territories of the States parties thereto or whether they are also applicable outside those territories and, if so, in what circumstances.

The scope of application of the International Covenant on Civil and Political Rights is defined by article 2 paragraph 1, thereof, which provides:

“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

This provision can be interpreted as covering only individuals who are both present within a State’s territory and subject to that State’s jurisdiction. It can also be construed as covering both individuals present within a State’s territory and those outside that territory but subject to that State’s jurisdiction. The Court will thus seek to determine the meaning to be given to this text.

The Court would observe that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.

The constant practice of the Human Rights Committee is consistent with this. Thus, the Committee has found the Covenant applicable where the State exercises its jurisdiction on foreign territory. It has ruled on the legality of acts by Uruguay in cases of arrests carried out by Uruguayan agents in Brazil or Argentina (*López Burgos v Uruguay* case number 52 of 1979, *Lilian Celiberti de Casariego v Uruguay* case number 56 of 1979). It decided to the same effect in the case of the confiscation of a passport by a Uruguayan consulate in Germany (*Montero v Uruguay* case number 106 of 1981)...

The Court takes note in this connection of the position taken by Israel, in relation to the applicability of the Covenant, in its communications to the Human Rights Committee, and of the view of the Committee.

In 1998, Israel stated that, when preparing its report to the Committee, it had had to face the question “whether individuals resident in the occupied territories were indeed subject to Israel’s jurisdiction” for purposes of the application of the Covenant (CCPR/C/SR1675, paragraph 21). Israel took the position that “the Covenant and similar instruments did not apply directly to the current situation in the occupied territories” (*ibid* paragraph 27).

The Committee, in its concluding observations after examination of the report, expressed concern at Israel’s attitude and pointed “to the long-standing presence of Israel in [the occupied] territories, Israel’s ambiguous attitude towards their future status, as well as the exercise of effective jurisdiction by Israeli security forces therein” (CCPR/C/79/Add 93, paragraph 10). In 2003 in face of Israel’s consistent position, to the effect that “the Covenant does not apply beyond its own territory, notably in the West Bank and Gaza”, the Committee reached the following conclusion: “in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party’s authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law” (CCPR/CO/78/ISR, paragraph 11).

In conclusion, the Court considers that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.

The International Covenant on Economic, Social and Cultural Rights contains no provision on its scope of application. This may be explicable by the fact that this

Covenant guarantees rights which are essentially territorial. However, it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction. Thus article 14 makes provision for transitional measures in the case of any State which “at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge”.

It is not without relevance to recall in this regard the position taken by Israel in its reports to the Committee on Economic, Social and Cultural Rights. In its initial report to the Committee of 4 December 1998, Israel provided “statistics indicating the enjoyment of the rights enshrined in the Covenant by Israeli settlers in the occupied Territories”. The Committee noted that, according to Israel, “the Palestinian population within the same jurisdictional areas were excluded from both the report and the protection of the Covenant” (E/C12/1/Add 27, paragraph 8). The Committee expressed its concern in this regard, to which Israel replied in a further report of 19 October 2001 that it has “consistently maintained that the Covenant does not apply to areas that are not subject to its sovereign territory and jurisdiction” (a formula inspired by the language of the International Covenant on Civil and Political Rights). This position, continued Israel, is “based on the well-established distinction between human rights and humanitarian law under international law”.

It added: “the Committee’s mandate cannot relate to events in the West Bank and the Gaza Strip, inasmuch as they are part and parcel of the context of armed conflict as distinct from a relationship of human rights” (E/1990/6/Add 32, paragraph 5). In view of these observations, the Committee reiterated its concern about Israel’s position and reaffirmed “its view that the State party’s obligations under the Covenant apply to all territories and populations under its effective control” (E/C12/1/Add 90, paragraphs 15 and 31).

For the reasons explained in paragraph 106 above, the Court cannot accept Israel’s view. It would also observe that the territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the occupying Power. In the exercise of the powers available to it on this basis, Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights. Furthermore, it is under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities.

As regards the Convention on the Rights of the Child of 20 November 1989, that instrument contains an article 2 according to which “States Parties shall respect and ensure the rights set forth in the Convention to each child within their jurisdiction “. That Convention is therefore applicable within the Occupied Palestinian Territory.

Having determined the rules and principles of international law relevant to reply to the question posed by the General Assembly, and having ruled in particular on the applicability within the Occupied Palestinian Territory of international humanitarian law and human rights law, the Court will now seek to ascertain whether the construction of the wall has violated those rules and principles.

In this regard, Annex II to the report of the Secretary-General, entitled "Summary Legal Position of the Palestine Liberation Organization", states that "The construction of the Barrier is an attempt to annex the territory contrary to international law" and that "The *de facto* annexation of land interferes with the territorial sovereignty and consequently with the right of the Palestinians to self-determination." This view was echoed in certain of the written statements submitted to the Court and in the views expressed at the hearings. *Inter alia*, it was contended that: "The wall severs the territorial sphere over which the Palestinian people are entitled to exercise their right of self-determination and constitutes a violation of the legal principle prohibiting the acquisition of territory by the use of force." In this connection, it was in particular emphasized that "The route of the wall is designed to change the demographic composition of the Occupied Palestinian Territory, including East Jerusalem, by reinforcing the Israeli settlements" illegally established on the Occupied Palestinian Territory. It was further contended that the wall aimed at "reducing and parcelling out the territorial sphere over which the Palestinian people are entitled to exercise their right of self-determination".

For its part, Israel has argued that the wall's sole purpose is to enable it effectively to combat terrorist attacks launched from the West Bank. Furthermore, Israel has repeatedly stated that the Barrier is a temporary measure (see report of the Secretary-General, paragraph 29). It did so *inter alia* through its Permanent Representative to the United Nations at the Security Council meeting of 14 October 2003, emphasizing that "[the fence] does not annex territories to the State of Israel", and that Israel is "ready and able, at tremendous cost, to adjust or dismantle a fence if so required as part of a political settlement" (S/PV4841, page 10). Israel's Permanent Representative restated this view before the General Assembly on 20 October and 8 December 2003. On this latter occasion, he added: "As soon as the terror ends, the fence will no longer be necessary."

The fence is not a border and has no political significance. It does not change the legal status of the territory in any way." (A/ES-10/PV23, page 6).

The Court would recall that both the General Assembly and the Security Council have referred, with regard to Palestine, to the customary rule of "the inadmissibility of the acquisition of territory by war" (see paragraphs 74 and 87 above). Thus in resolution 242 (1967) of 22 November 1967, the Security Council, after recalling this rule, affirmed that:

“The fulfilment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles:

Withdrawal of Israel armed forces from territories occupied in the recent conflict;

Termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force.

It is on this same basis that the Council has several times condemned the measures taken by Israel to change the status of Jerusalem (see paragraph 75 above).”

As regards the principle of the right of peoples to self-determination, the Court observes that the existence of a “Palestinian people” is no longer in issue. Such existence has moreover been recognized by Israel in the exchange of letters of 9 September 1993 between Mr Yasser Arafat, President of the Palestine Liberation Organization (PLO) and Mr Yitzhak Rabin, Israeli Prime Minister. In that correspondence, the President of the PLO recognized “the right of the State of Israel to exist in peace and security” and made various other commitments. In reply, the Israeli Prime Minister informed him that, in the light of those commitments, “the Government of Israel has decided to recognize the PLO as the representative of the Palestinian people”. The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 28 September 1995 also refers a number of times to the Palestinian people and its “legitimate rights” (Preamble, paragraphs 4, 7, 8; article II, paragraph 2; article III, paragraphs 1 and 3; article XXII, paragraph 2). The Court considers that those rights include the right to self-determination, as the General Assembly has moreover recognized on a number of occasions (see, for example, resolution 58/163 of 22 December 2003).

The Court notes that the route of the wall as fixed by the Israeli Government includes within the “Closed Area” (see paragraph 85 above) some 80 per cent of the settlers living in the Occupied Palestinian Territory. Moreover, it is apparent from an examination of the map mentioned in paragraph 80 above that the wall’s sinuous route has been traced in such a way as to include within that area the great majority of the Israeli settlements in the occupied Palestinian Territory (including East Jerusalem).

As regards these settlements, the Court notes that article 49, paragraph 6, of the Fourth Geneva Convention provides: “The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.” That provision prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory.

In this respect, the information provided to the Court shows that, since 1977, Israel has conducted a policy and developed practices involving the establishment of settlements in the Occupied Palestinian Territory, contrary to the terms of article 49, paragraph 6, just cited.

The Security Council has thus taken the view that such policy and practices “have no legal validity”. It has also called upon “Israel, as the occupying Power, to abide scrupulously” by the Fourth Geneva Convention and: “to rescind its previous measures and to desist from taking any action which would result in changing the legal status and geographical nature and materially affecting the demographic composition of the Arab territories occupied since 1967, including Jerusalem and, in particular, not to transfer parts of its own civilian population into the occupied Arab territories” (resolution 446 (1979) of 22 March 1979).

The Council reaffirmed its position in resolutions 452 (1979) of 20 July 1979 and 465 (1980) of 1 March 1980. Indeed, in the latter case it described “Israel’s policy and practices of settling parts of its population and new immigrants in [the occupied] territories” as a “flagrant violation” of the Fourth Geneva Convention.

The Court concludes that the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law.

Whilst the Court notes the assurance given by Israel that the construction of the wall does not amount to annexation and that the wall is of a temporary nature (see paragraph 116 above), it nevertheless cannot remain indifferent to certain fears expressed to it that the route of the wall will prejudice the future frontier between Israel and Palestine, and the fear that Israel may integrate the settlements and their means of access. The Court considers that the construction of the wall and its associated régime create a “fait accompli” on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to *de facto* annexation.

The Court recalls moreover that, according to the report of the Secretary-General, the planned route would incorporate in the area between the Green Line and the wall more than 16 per cent of the territory of the West Bank. Around 80 per cent of the settlers living in the Occupied Palestinian Territory, that is 320 000 individuals, would reside in that area, as well as 237 000 Palestinians. Moreover, as a result of the construction of the wall, around 160 000 other Palestinians would reside in almost completely encircled communities (see paragraphs 84, 85 and 119 above).

In other terms, the route chosen for the wall gives expression *in loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements, as deplored by the Security Council (see paragraphs 75 and 120 above). There is also a risk of further alterations to the demographic composition of the Occupied

Palestinian Territory resulting from the construction of the wall inasmuch as it is contributing, as will be further explained in paragraph 133 below, to the departure of Palestinian populations from certain areas. That construction, along with measures taken previously, thus severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right.

The construction of the wall also raises a number of issues in relation to the relevant provisions of international humanitarian law and of human rights instruments.

With regard to the Hague Regulations of 1907, the Court would recall that these deal, in section II, with hostilities and in particular with "means of injuring the enemy, sieges, and bombardments". Section III deals with military authority in occupied territories. Only Section III is currently applicable in the West Bank and article 23(g) of the Regulations, in Section II, is thus not pertinent.

Section III of the Hague Regulations includes articles 43, 46 and 52, which are applicable in the Occupied Palestinian Territory. Article 43 imposes a duty on the occupant to "take all measures within his power to restore, and, as far as possible, to insure public order and life, respecting the laws in force in the country". Article 46 adds that private property must be "respected" and that it cannot "be confiscated". Lastly, article 52 authorizes, within certain limits, requisitions in kind and services for the needs of the army of occupation.

A distinction is also made in the Fourth Geneva Convention between provisions applying during military operations leading to occupation and those that remain applicable throughout the entire period of occupation. It thus states in article 6:

"The present Convention shall apply from the outset of any conflict or occupation mentioned in article 2.

In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations.

In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.

Protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by the present Convention."

Since the military operations leading to the occupation of the West Bank in 1967 ended a long time ago, only those articles of the Fourth Geneva Convention referred to in article 6, paragraph 3, remain applicable in that occupied territory.

(These provisions include articles 47, 49, 52, 53 and 59 of the Fourth Geneva Convention...

The International Covenant on Civil and Political Rights also contains several relevant provisions. Before further examining these, the Court will observe that article 4 of the Covenant allows for derogation to be made, under various conditions, to certain provisions of that instrument.

Israel made use of its right of derogation under this article by addressing the following communication to the Secretary-General of the United Nations on 3 October 1991:

“Since its establishment, the State of Israel has been the victim of continuous threats and attacks on its very existence as well as on the life and property of its citizens.

These have taken the form of threats of war, of actual armed attacks, and campaigns of terrorism resulting in the murder of and injury to human beings.

In view of the above, the State of Emergency which was proclaimed in May 1948 has remained in force ever since. This situation constitutes a public emergency within the meaning of article 4(1) of the Covenant.

The Government of Israel has therefore found it necessary, in accordance with the said article 4, to take measures to the extent strictly required by the exigencies of the situation, for the defence of the State and for the protection of life and property, including the exercise of powers of arrest and detention.

In so far as any of these measures are inconsistent with article 9 of the Covenant, Israel thereby derogates from its obligations under that provision.”

The Court notes that the derogation so notified concerns only article 9 of the International Covenant on Civil and Political Rights, which deals with the right to liberty and security of person and lays down the rules applicable in cases of arrest or detention.

The other articles of the Covenant therefore remain applicable not only on Israeli territory, but also on the Occupied Palestinian Territory.

Among these mention must be made of article 17, paragraph 1 of which reads as follows: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation”.

Mention must also be made of article 12, paragraph 1, which provides: “Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.”

In addition to the general guarantees of freedom of movement under article 12 of the International Covenant on Civil and Political Rights, account must also be taken of specific guarantees of access to the Christian, Jewish and Islamic Holy Places. The status of the Christian Holy Places in the Ottoman Empire dates far back in time, the latest provisions relating thereto having been incorporated into article 62 of the Treaty of Berlin of 13 July 1878...

As regards the International Covenant on Economic, Social and Cultural Rights, that instrument includes a number of relevant provisions, namely: the right to work (articles 6 and 7); protection and assistance accorded to the family and to children and young persons (article 10); the right to an adequate standard of living, including adequate food, clothing and housing, and the right “to be free from hunger” (article 11); the right to health (Article 12); the right to education (articles 13 and 14).

Lastly, the United Nations Convention on the Rights of the Child of 20 November 1989 includes similar provisions in articles 16, 24, 27 and 28.

From the information submitted to the Court, particularly the report of the Secretary-General, it appears that the construction of the wall has led to the destruction or requisition of properties under conditions which contravene the requirements of articles 46 and 52 of the Hague Regulations of 1907 and of article 53 of the Fourth Geneva Convention.

To sum up, the Court is of the opinion that the construction of the wall and its associated régime impede the liberty of movement of the inhabitants of the Occupied Palestinian Territory (with the exception of Israeli citizens and those assimilated thereto) as guaranteed under article 12, paragraph 1, of the International Covenant on Civil and Political Rights. They also impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights and in the United Nations Convention on the Rights of the Child. Lastly, the construction of the wall and its associated régime, by contributing to the demographic changes referred to in paragraphs 122 and 133 above, contravene article 49, paragraph 6, of the Fourth Geneva Convention and the Security Council resolutions cited in paragraph 120 above.

The Court would observe, however, that the applicable international humanitarian law contains provisions enabling account to be taken of military exigencies in certain circumstances ...

The Court considers that the military exigencies contemplated by these texts may be invoked in occupied territories even after the general close of the military operations that led to their occupation. However, on the material before it, the Court is not convinced that the destructions carried out contrary to the prohibition in article 53 of the Fourth Geneva Convention were rendered absolutely necessary by military operations.

The Court would further observe that some human rights conventions, and in particular the International Covenant on Civil and Political Rights, contain provisions which States parties may invoke in order to derogate, under various conditions, from certain of their conventional obligations. In this respect, the Court would however recall that the communication notified by Israel to the Secretary-General of the United Nations under article 4 of the International Covenant on Civil and Political Rights concerns only article 9 of the Covenant, relating to the right to freedom and security of person (see paragraph 127 above); Israel is accordingly bound to respect all the other provisions of that instrument.

The Court would note, moreover, that certain provisions of human rights conventions contain clauses qualifying the rights covered by those provisions. There is no clause of this kind in article 17 of the International Covenant on Civil and Political Rights ...

On the basis of the information available to it, the Court finds that these conditions are not met in the present instance.

The Court would further observe that the restrictions on the enjoyment by the Palestinians living in the territory occupied by Israel of their economic, social and cultural rights, resulting from Israel's construction of the wall, fail to meet a condition laid down by article 4 of the International Covenant on Economic, Social and Cultural Rights, that is to say that their implementation must be "solely for the purpose of promoting the general welfare in a democratic society".

To sum up, the Court, from the material available to it, is not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives. The wall, along the route chosen, and its associated régime gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel, and the infringements resulting from that route cannot be justified by military exigencies or by the requirements of national security or public order. The construction of such a wall accordingly constitutes breaches by Israel of various of its obligations under the applicable international humanitarian law and human rights instruments.

The Court has thus concluded that the construction of the wall constitutes action not in conformity with various international legal obligations incumbent upon Israel ...

... Consequently, the Court concludes that article 51 of the Charter has no relevance in this case.

The Court has, however, considered whether Israel could rely on a state of necessity which would preclude the wrongfulness of the construction of the wall. In this regard the Court is bound to note that some of the conventions at issue in the present instance include qualifying clauses of the rights guaranteed or provisions for derogation (see paragraphs 135 and 136 above)...

The fact remains that Israel has to face numerous indiscriminate and deadly acts of violence against its civilian population. It has the right, and indeed the duty, to respond in order to protect the life of its citizens. The measures taken are bound nonetheless to remain in conformity with applicable international law.

In conclusion, the Court considers that Israel cannot rely on a right of self-defence or on a state of necessity in order to preclude the wrongfulness of the construction of the wall resulting from the considerations mentioned in paragraphs 122 and 137 above. The Court accordingly finds that the construction of the wall, and its associated régime, are contrary to international law.

The Court having concluded that, by the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, and by adopting its associated régime, Israel has violated various international obligations incumbent upon it (see paragraphs 114–137 above), it must now, in order to reply to the question posed by the General Assembly, examine the consequences of those violations.

In their written and oral observations, many participants in the proceedings before the Court contended that Israel's action in illegally constructing this wall has legal consequences not only for Israel itself, but also for other States and for the United Nations; in its Written Statement, Israel, for its part, presented no arguments regarding the possible legal consequences of the construction of the wall.

As regards the legal consequences for Israel, it was contended that Israel has, first, a legal obligation to bring the illegal situation to an end by ceasing forthwith the construction of the wall in the Occupied Palestinian Territory, and to give appropriate assurances and guarantees of non-repetition ...

Since the Court has concluded that the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime, are contrary to various of Israel's international obligations, it follows that the responsibility of that State is engaged under international law.

The Court will now examine the legal consequences resulting from the violations of international law by Israel by distinguishing between, on the one hand, those arising for Israel and, on the other, those arising for other States and, where appropriate, for the

United Nations. The Court will begin by examining the legal consequences of those violations for Israel.

The Court observes that Israel also has an obligation to put an end to the violation of its international obligations flowing from the construction of the wall in the Occupied Palestinian Territory. The obligation of a State responsible for an internationally wrongful act to put an end to that act is well established in general international law, and the Court has on a number of occasions confirmed the existence of that obligation (Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v United States of America*), Merits, Judgment, ICJ Reports 1986, page 149; United States Diplomatic and Consular Staff in Tehran, Judgment, ICJ Reports 1980, page 44, paragraph 95; Haya de la Torre, Judgment, ICJ Reports 1951, page 82).

Israel accordingly has the obligation to cease forthwith the works of construction of the wall being built by it in the Occupied Palestinian Territory, including in and around East Jerusalem.

Moreover, in view of the Court's finding (see paragraph 143 above) that Israel's violations of its international obligations stem from the construction of the wall and from its associated régime, cessation of those violations entails the dismantling forthwith of those parts of that structure situated within the Occupied Palestinian Territory, including in and around East Jerusalem. All legislative and regulatory acts adopted with a view to its construction, and to the establishment of its associated régime, must forthwith be repealed or rendered ineffective, except in so far as such acts, by providing for compensation or other forms of reparation for the Palestinian population, may continue to be relevant for compliance by Israel with the obligations referred to in paragraph 153 below.

Moreover, given that the construction of the wall in the Occupied Palestinian Territory has, *inter alia*, entailed the requisition and destruction of homes, businesses and agricultural holdings, the Court finds further that Israel has the obligation to make reparation for the damage caused to all the natural or legal persons concerned. The Court would recall that the essential forms of reparation in customary law were laid down by the Permanent Court of International Justice in the following terms:

"The essential principle contained in the actual notion of a principle which seems to be established by international an illegal act is that practice and in particular by the decisions of arbitral tribunals reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which such are would not be covered by restitution in kind or payment in place of it the principles which should serve to determine the amount of compensation due for an act contrary to international law." (Factory at Chorzów, Merits, Judgment number 13, 1928, PCIJ Series A, number 17, page 47).

Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered. The Court considers that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall's construction.

The Court will now consider the legal consequences of the internationally wrongful acts flowing from Israel's construction of the wall as regards other States.

The Court would observe that the obligations violated by Israel include certain obligations *erga omnes*. As the Court indicated in the Barcelona Traction case, such obligations are by their very nature "the concern of all States" and, "In view of the importance of the rights involved, all States can be held to have a legal interest in their protection." (Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, ICJ Reports 1970, page 32, paragraph 33.)

The obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law.

As regards the first of these, the Court has already observed (paragraph 88 above) that in the East Timor case, it described as "irreproachable" the assertion that "the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character" (ICJ Reports 1995, page 102, paragraph 29). The Court would also recall that under the terms of General Assembly resolution 2625 (XXV), already mentioned above (see paragraph 88), "Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle".

With regard to international humanitarian law, the Court recalls that in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, it stated that "a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity', that they are 'to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law'" (ICJ Reports 1996 (I), page 257, paragraph 79). In the Court's view, these rules incorporate obligations which are essentially of an *erga omnes* character.

The Court would also emphasize that article 1 of the Fourth Geneva Convention, a provision common to the four Geneva Conventions, provides that "The High

Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” It follows from that provision that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.

Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.

Finally, the Court is of the view that the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.

The Court, being concerned to lend its support to the purposes and principles laid down in the United Nations Charter, in particular the maintenance of international peace and security and the peaceful settlement of disputes, would emphasize the urgent necessity for the United Nations as a whole to redouble its efforts to bring the Israeli-Palestinian conflict, which continues to pose a threat to international peace and security, to a speedy conclusion, thereby establishing a just and lasting peace in the region.

The Court has reached the conclusion that the construction of the wall by Israel in the Occupied Palestinian Territory is contrary to international law and has stated the legal consequences that are to be drawn from that illegality. The Court considers itself bound to add that this construction must be placed in a more general context. Since 1947, the year when General Assembly resolution 181(II) was adopted and the Mandate for Palestine was terminated, there has been a succession of armed conflicts, acts of indiscriminate violence and repressive measures on the former mandated territory. The Court would emphasize that both Israel and Palestine are under an obligation scrupulously to observe the rules of international humanitarian law, one of the paramount purposes of which is to protect civilian life. Illegal actions and unilateral decisions have been taken on all sides, whereas, in the Court’s view, this tragic situation can be brought to an end only through implementation in good faith of all relevant Security Council resolutions, in particular resolutions 242 (1967) and 338 (1973). The “Roadmap” approved by Security Council resolution 1515 (2003) represents the most recent of efforts to initiate negotiations to this end. The Court considers that it has a duty to draw the attention of the General Assembly, to which the present Opinion is addressed, to the need for these efforts to be encouraged with a view to achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and the

establishment of a Palestinian State, existing side by side with Israel and its other neighbours, with peace and security for all in the region.

For these reasons:

2. THE COURT

(a) Unanimously

Finds that it has jurisdiction to give the advisory opinion requested;

(b) By fourteen votes to one

Decides to comply with the request for an advisory opinion;

In Favour: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;

Against: Judge Buergenthal;

(c) Replies in the following manner to the question put by the General Assembly

(i) By fourteen votes to one

The construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime, are contrary to international law;

In Favour: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;

Against: Judge Buergenthal;

(ii) By fourteen votes to one

Israel is under an obligation to terminate its breaches of international law; it is under an obligation to cease forthwith the works of construction of the wall being built in the Occupied Palestinian Territory, including in and around East Jerusalem, to dismantle forthwith the structure therein situated, and to repeal or render ineffective forthwith all legislative and regulatory acts relating thereto, in accordance with paragraph 151 of this Opinion;

In Favour: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;

Against: Judge Buergenthal;

(iii) *By fourteen votes to one*

Israel is under an obligation to make reparation for all damage caused by the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem;

In Favour: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;

Against: Judge Buergenthal;

(iv) *By thirteen votes to two*

All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction; all States parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention;

In Favour: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;

Against: Judges Kooijmans, Buergenthal;

(v) *By fourteen votes to one*

The United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.

In Favour: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;

Against: Judge Buergenthal.

Judges Koroma, Higgins, Kooijmans and Al-Khasawneh append separate opinions to the Advisory Opinion of the Court;

Judge Buergenthal appends a declaration to the Advisory Opinion of the Court; Judges Elaraby and Owada append separate opinions to the Advisory Opinion of the Court.

For the appellant:

Information not available

For the respondent:

Information not available

THE PROSECUTOR V JEAN-PAUL AKAYESU

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

CASE NUMBER ICTR-96-4-T

Held – Genocide was, indeed, committed in Rwanda in 1994 against the Tutsi as a group. Furthermore, this genocide appears to have been meticulously organized.

The court's sole task is to assess the individual criminal responsibility of the accused for the crimes with which he is charged, the burden of proof being on the Prosecutor. In spite of the irrefutable atrocities of the crimes committed in Rwanda, the judges must examine the facts adduced in a most dispassionate manner, bearing in mind that the accused is presumed innocent. Moreover, the seriousness of the charges brought against the accused makes it all the more necessary to examine scrupulously and meticulously all the inculpatory and exonerating evidence, in the context of a fair trial and in full respect of all the rights of the accused.

Armed conflict existed in Rwanda during the events alleged in the indictment, and that the RPF was an organised armed group, under responsible command, which exercised control over territory in Rwanda and was able to carry out sustained and concerted military operations.

On or about 19 April 1994, Akayesu ordered the local people and Interahamwe to kill intellectual people'. Amongst the teachers who were killed were Tharcisse, Theogene, Phoebe Uwizeze and her fiancé. It has been proved beyond reasonable doubt that Tharcisse was killed in the presence of Akaye.

The victims were all killed by local people and Interahamwe using machetes and agricultural tools on the road in front of the bureau communal.

The accused had reason to know and in fact knew that sexual violence was taking place on or near the premises of the bureau communal, and that women were being taken away from the bureau communal and sexually violated. ...On the first occasion he was looking at them, and on the second occasion he was standing at the entrance to the cultural center. On this second occasion, he said, "Never ask me again what a Tutsi woman tastes like".

It is acceptable to convict the accused of two offences in relation to the same set of facts in the following circumstances:

- (1) where the offences have different elements; or
- (2) where the provisions creating the offences protect different interests; or

- (3) where it is necessary to record a conviction for both offences in order fully to describe what the accused did. However, it is not justifiable to convict an accused of two offences in relation to the same set of facts where
 - (a) one offence is a lesser included offence of the other, for example, murder and grievous bodily harm, robbery and theft, or rape and indecent assault; or
 - (b) where one offence charges accomplice liability and the other offence charges liability as a principal, e.g. genocide and complicity in genocide.

Genocide, crimes against humanity, and violations of article 3 common to the Geneva Conventions and of Additional Protocol II – have different elements and, moreover, are intended to protect different interests. The crime of genocide exists to protect certain groups from extermination or attempted extermination. The concept of crimes against humanity exists to protect civilian populations from persecution. The idea of violations of article 3 common to the Geneva Conventions and of Additional Protocol II is to protect non-combatants from war crimes in civil war. These crimes have different purposes and are, therefore, never co-extensive. Thus it is legitimate to charge these crimes in relation to the same set of facts.

Criminal intent is the moral element required for any crime and that, where the objective is to ascertain the individual criminal responsibility of a person accused of crimes such as genocide, crimes against humanity and violations of article 3 Common to the Geneva Conventions and of Additional Protocol II thereto, it is certainly proper to ensure that there has been malicious intent, or, at least, ensure that negligence was so serious as to be tantamount to acquiescence or even malicious intent.

Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in “the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”.

A national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties; An ethnic group is generally defined as a group whose members share a common language or culture; the conventional definition of racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors and a religious group is one whose members share the same religion, denomination or mode of worship.

The intent or mental element of complicity implies in general that, at the moment he acted, the accomplice knew of the assistance he was providing in the commission of the principal offence. In other words, the accomplice must have acted knowingly.

An accused is liable as an accomplice to genocide if he knowingly aided or abetted or instigated one or more persons in the commission of genocide, while knowing that such a person or persons were committing genocide, even though the accused himself did not have the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

Where a person is accused of aiding and abetting, planning, preparing or executing genocide, it must be proven that such a person acted with specific genocidal intent, i.e. the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such, whereas, as stated above, there is no such requirement to establish accomplice liability in genocide.

Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character.

Rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.

An internal armed conflict exists whenever there is a protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a peaceful settlement is reached.

The term, armed conflict' in itself suggests the existence of hostilities between armed forces organized to a greater or lesser extent. This consequently rules out situations of internal disturbances and tensions. For a finding to be made on the existence of an internal armed conflict in the territory of Rwanda at the time of the events alleged, it will therefore be necessary to evaluate both the intensity and organization of the parties to the conflict.

There was a widespread and systematic attack against the civilian population in Rwanda on 19 April 1994 and the conduct of the accused formed part of this attack.

Akayesu had the intent to directly create a particular state of mind in his audience necessary to lead to the destruction of the Tutsi group, as such. Accordingly, the chamber finds that the said acts constitute the crime of direct and public incitement to commit genocide.

Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like

torture, rape is a violation of personal dignity, and rape in fact constitutes torture when it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Rape is a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact. The incident described by Witness KK in which the accused ordered the Interahamwe to undress a student and force her to do gymnastics naked in the public courtyard of the bureau communal, in front of a crowd, constitutes sexual violence.

Coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interahamwe among refugee Tutsi women at the bureau communal. Sexual violence falls within the scope of “other inhumane acts”.

Cases referred to in judgment

(“A” means adopted; “AL” means allowed; “AP” means applied; “APP” means approved; “C” means considered; “D” means distinguished; “DA” means disapproved; “DT” means doubted; “E” means explained; “F” means followed; “O” means overruled)

Others

The Prosecutor v Dusko Tadic

Prosecutor v Tadic

National Coal Board v Gamble

KAMA, PRESIDING, ASPEGREN AND PILLAY JJ

1. THE INDICTMENT

The Indictment against Jean-Paul Akayesu was submitted by the Prosecutor on 13 February 1996 and was confirmed on 16 February 1996. It was amended during the trial, in June 1997, with the addition of three counts (13 to 15) and three paragraphs (10A, 12A and 12B). The Amended Indictment is here set out in full:

“The Prosecutor of the International Criminal Tribunal for Rwanda, pursuant to his authority under article 17 of the Statute of the Tribunal, charges: Jean Paul Akayesu With Genocide, Crimes Against Humanity Aand Violations of Article 3 Common to the Geneva Conventions, as set forth below:

2. BACKGROUND

On 6 April 1994, a plane carrying President Juvénal Habyarimana of Rwanda and President Cyprien Ntaryamira of Burundi crashed at Kigali airport, killing all on board. Following the deaths of the two Presidents, widespread killings, having both political and ethnic dimensions, began in Kigali and spread to other parts of Rwanda.

Rwanda is divided into 11 prefectures, each of which is governed by a prefect. The prefectures are further subdivided into communes which are placed under the authority of bourgmestres. The bourgmestre of each commune is appointed by the President of the Republic, upon the recommendation of the Minister of the Interior. In Rwanda, the bourgmestre is the most powerful figure in the commune. His *de facto* authority in the area is significantly greater than that which is conferred upon him *de jure*.

3. THE ACCUSED

Jean Paul Akayesu, born in 1953 in Murehe sector, Taba commune, served as bourgmestre of that commune from April 1993 until June 1994. Prior to his appointment as bourgmestre, he was a teacher and school inspector in Taba.

As bourgmestre, Jean Paul Akayesu was charged with the performance of executive functions and the maintenance of public order within his commune, subject to the authority of the prefect. He had exclusive control over the communal police, as well as any gendarmes put at the disposition of the commune. He was responsible for the execution of laws and regulations and the administration of justice, also subject only to the prefect's authority.

4. GENERAL ALLEGATIONS

(a) Charges

As bourgmestre, Jean Paul Akayesu was responsible for maintaining law and public order in his commune. At least 2000 Tutsis were killed in Taba between April 7 and the end of June 1994, while he was still in power. The killings in Taba were openly committed and so widespread that, as bourgmestre, Jean Paul Akayesu must have known about them. Although he had the authority and responsibility to do so, Jean Paul Akayesu never attempted to prevent the killing of Tutsis in the commune in any way or called for assistance from regional or national authorities to quell the violence.

- (1)(a) Between April 7 and the end of June 1994, hundreds of civilians (hereinafter “displaced civilians”) sought refuge at the bureau communal. The majority of these displaced civilians were Tutsi. While seeking refuge at the bureau communal, female displaced civilians were regularly taken by armed local militia and/or communal police and subjected to sexual violence, and/or beaten on or near the bureau communal premises. Displaced civilians were also murdered frequently on or near the bureau communal premises. Many women were forced to endure multiple acts of sexual violence which were at times committed by more than one assailant. These acts of sexual violence were generally accompanied by explicit threats of death or bodily harm. The female displaced civilians lived in constant fear and their physical and psychological health deteriorated as a result of the sexual violence and beatings and killings.
- (1)(b) Jean Paul akayesu knew that the acts of sexual violence, beatings and murders were being committed and was at times present during their commission. Jean Paul Akayesu facilitated the commission of the sexual violence, beatings and murders by allowing the sexual violence and beatings and murders to occur on or near the bureau communal premises. By virtue of his presence during the commission of the sexual violence, beatings and murders and by failing to prevent the sexual violence, beatings and murders, Jean Paul Akayesu encouraged these activities

On or about 19 April 1994, before dawn, in Gishyeshye sector, Taba commune, a group of men, one of whom was named Francois Ndimubanzi, killed a local teacher, Sylvere Karera, because he was accused of associating with the Rwandan Patriotic Front (“RPF”) and plotting to kill Hutus. Even though at least one of the perpetrators was turned over to Jean Paul Akayesu, he failed to take measures to have him arrested.

The morning of 19 April 1994, following the murder of Sylvere Karera, Jean Paul Akayesu led a meeting in Gishyeshye sector at which he sanctioned the death of Sylvere Karera and urged the population to eliminate accomplices of the RPF, which was understood by those present to mean Tutsis. Over 100 people were present at the meeting. The killing of Tutsis in Taba began shortly after the meeting.

At the same meeting in Gishyeshye sector on 19 April 1994, Jean Paul Akayesu named at least three prominent Tutsis – Ephrem Karangwa, Juvénal Rukundakuvuga and Emmanuel Sempabwa – who had to be killed because of their alleged relationships with the RPF. Later that day, Juvénal Rukundakuvuga was killed in Kanyinya. Within the next few days, Emmanuel Sempabwa was clubbed to death in front of the Taba bureau communal.

Jean Paul Akayesu, on or about 19 April 1994, conducted house-to-house searches in Taba. During these searches, residents, including Victim V, were interrogated and beaten with rifles and sticks in the presence of Jean Paul Akayesu

ean Paul Akayesu personally threatened to kill the husband and child of Victim U if she did not provide him with information about the activities of the Tutsis he was seeking.

On or about 19 April 1994, Jean Paul Akayesu ordered the interrogation and beating of Victim X in an effort to learn the whereabouts of Ephrem Karangwa. During the beating, Victim X's fingers were broken as he tried to shield himself from blows with a metal stick.

On or about 19 April 1994, the men who, on Jean Paul Akayesu's instructions, were searching for Ephrem Karangwa destroyed Ephrem Karangwa's house and burned down his mother's house. They then went to search the house of Ephrem Karangwa's brother-in-law in Musambira commune and found Ephrem Karangwa's three brothers there. The three brothers – Simon Mutijima, Thaddée Uwanyiligira and Jean Chrysostome Gakuba – tried to escape, but Jean Paul Akayesu blew his whistle to alert local residents to the attempted escape and ordered the people to capture the brothers. After the brothers were captured, Jean Paul Akayesu ordered and participated in the killings of the three brothers.

On or about 19 April 1994, Jean Paul Akayesu took 8 detained men from the Taba bureau communal and ordered militia members to kill them. The militia killed them with clubs, machetes, small axes and sticks. The victims had fled from Runda commune and had been held by Jean Paul Akayesu.

On or about 19 April 1994, Jean Paul Akayesu ordered the local people and militia to kill intellectual and influential people. Five teachers from the secondary school of Taba were killed on his instructions. The victims were Theogene, Phoebe Uwineze and her fiancé (whose name is unknown), Tharcisse Twizyumuremye and Samuel. The local people and militia killed them with machetes and agricultural tools in front of the Taba bureau communal.

On or about 20 April 1994, Jean Paul Akayesu and some communal police went to the house of Victim Y, a 68 year old woman. Jean Paul Akayesu interrogated her about the whereabouts of the wife of a university teacher. During the questioning, under Jean Paul Akayesu's supervision, the communal police hit Victim Y with a gun and sticks. They bound her arms and legs and repeatedly kicked her in the chest. Jean Paul Akayesu threatened to kill her if she failed to provide the information he sought.

Later that night, on or about 20 April 1994, Jean Paul Akayesu picked up Victim W in Taba and interrogated her also about the whereabouts of the wife of the university teacher. When she stated she did not know, he forced her to lay on the road in front of his car and threatened to drive over her.

Thereafter, on or about 20 April 1994, Jean Paul Akayesu picked up Victim Z in Taba and interrogated him. During the interrogation, men under Jean Paul Akayesu's authority forced Victims Z and Y to beat each other and used a piece of Victim Y's dress to strangle Victim Z.

5. JURISDICTION OF THE TRIBUNAL

The subject-matter jurisdiction of the ICTR is set out in articles 2, 3 and 4 of the Statute:

- (a) Article 2: Genocide
- (b) Article 3: Crimes Against Humanity
- (c) Article 4: Violations of article 3 common to the Geneva Conventions and of Additional Protocol II
- (d) Article 6: Individual Criminal Responsibility
- (e) The Trial
 - (i) Procedural Background
 - (ii) The Accused's line of defence

The accused has pleaded not guilty to all counts of the Indictment, both at his initial appearance, held on 30 May 1996, and at the hearing of 23 October 1997 when he pleaded not guilty to each of the new counts which had been added to the Indictment when it was amended on 17 June 1997.

In essence, the defence case – insofar as the chamber has been able to establish it is that the accused did not commit, order or participate in any of the killings, beatings or acts of sexual violence alleged in the Indictment. The defence concedes that a genocide occurred in Rwanda and that massacres of Tutsi took place in Taba Commune, but it argues that the accused was helpless to prevent them, being outnumbered and overpowered by one Silas Kubwimana and the Interahamwe. The defence pointed out that, according to prosecution witness R, Akayesu had been so harassed by the Interahamwe that at one point he had had to flee Taba commune. Once the massacres had become widespread, the accused was denuded of all authority and lacked the means to stop the killings.

- (iii) The Accused and his functions in Taba (paragraphs 3–4 of the Indictment)

6. HISTORICAL CONTEXT OF THE EVENTS IN RWANDA IN 1994

(a) Genocide in Rwanda in 1994?

Even though the number of victims is yet to be known with accuracy, no one can reasonably refute the fact that widespread killings were perpetrated throughout Rwanda in 1994.

The British cameraman, Simon Cox, took photographs of bodies in many churches in Remera, Biambi, Shangi, between Cyangugu and Kibuye, and in Bisesero. He mentioned identity cards strewn on the ground, all of which were

marked “Tutsi”. Consequently, in view of these widespread killings the victims of which were mainly Tutsi, the chamber is of the opinion that the first requirement for there to be genocide has been met, the killing and causing serious bodily harm to members of a group.

The second requirement is that these killings and serious bodily harm, as is the case in this instance, be committed with the intent to destroy, in whole or in part, a particular group targeted as such.

In the opinion of the chamber, there is no doubt that considering their undeniable scale, their systematic nature and their atrociousness, the massacres were aimed at exterminating the group that was targeted. Many facts show that the intention of the perpetrators of these killings was to cause the complete disappearance of the Tutsi. In this connection, Alison Desforges, an expert witness, in her testimony before this chamber on 25 February 1997, stated as follows: “on the basis of the statements made by certain political leaders, on the basis of songs and slogans popular among the Interahamwe, I believe that these people had the intention of completely wiping out the Tutsi from Rwanda so that—as they said on certain occasions – their children, later on, would not know what a Tutsi looked like, unless they referred to history books”. Moreover, this testimony given by Dr Desforges was confirmed by two prosecution witnesses, witness KK and witness OO, who testified separately before the Tribunal that one Silas Kubwimana had said during a public meeting chaired by the accused himself that all the Tutsi had to be killed so that someday Hutu children would not know what a Tutsi looked like.

Furthermore, as mentioned above, Dr Zachariah also testified that the Achilles' tendons of many wounded persons were cut to prevent them from fleeing. In the opinion of the chamber, this demonstrates the resolve of the perpetrators of these massacres not to spare any Tutsi. Their plan called for doing whatever was possible to prevent any Tutsi from escaping and, thus, to destroy the whole group. Witness OO further told the chamber that during the same meeting, a certain Ruvugama, who was then a Member of Parliament, had stated that he would rest only when no single Tutsi is left in Rwanda”.

In light of the foregoing, it is now appropriate for the chamber to consider the issue of specific intent that is required for genocide (*mens rea* or *dolus specialis*). In other words, it should be established that the above-mentioned acts were targeted at a particular group as such. In this respect also, many consistent and reliable testimonies, especially those of Major-General Dallaire, Dr Zachariah, victim V, prosecution witness PP, defence witness DAAX, and particularly that of the accused himself unanimously agree on the fact that it was the Tutsi as members of an ethnic group which they formed in the context of the period in question, who were targeted during the massacres.

Two facts, in particular, which suggest that it was indeed the Tutsi who were targeted should be highlighted: Firstly, at the roadblocks which were erected in

Kigali immediately after the crash of the President's plane on 6 April 1994 and, later on, in most of the country's localities, members of the Tutsi population were sorted out. Indeed, at these roadblocks which were manned, depending on the situation, either by soldiers, troops of the Presidential Guard and/or militiamen, the systematic checking of identity cards indicating the ethnic group of their holders, allowed the separation of Hutu from Tutsi, with the latter being immediately apprehended and killed, sometimes on the spot. Secondly, the propaganda campaign conducted before and during the tragedy by the audiovisual media, for example, "Radio Television des Milles Collines"(RTLM), or the print media, like the *Kangura* newspaper. These various news media overtly called for the killing of Tutsi, who were considered as the accomplices of the RPF and accused of plotting to take over the power lost during the revolution of 1959. Some articles and cartoons carried in the *Kangura* newspaper, entered in evidence, are unambiguous in this respect. In fact, even exhibit 25A could be added to this lot. Exhibit 25A is a letter from the "GZ" staff headquarters dated 21 September 1992 and signed by Deofratas Nsabimana, Colonel, BEM, to which is annexed a document prepared by a committee of ten officers and which deals with the definition of the term enemy. According to that document, which was intended for the widest possible dissemination, the enemy fell into two categories, namely: "the primary enemy" and the "enemy supporter". The primary enemy was defined as "the extremist Tutsi within the country or abroad who are nostalgic for power and who have Never acknowledged and Still Do Not acknowledge the realities of the Social Revolution of 1959, and who wish to regain power in Rwanda by all possible means, including the use of weapons". On the other hand, the primary enemy supporter was "anyone who lent support in whatever form to the primary enemy". This document also stated that the primary enemy and their supporters came mostly from social groups comprising, in particular, "Tutsi refugees", "Tutsi within the country", "Hutu dissatisfied with the current regime", "Foreigners married to Tutsi women" and the "Nilotic-hamitic tribes in the region".

In the opinion of the chamber, all this proves that it was indeed a particular group, the Tutsi ethnic group, which was targeted. Clearly, the victims were not chosen as individuals but, indeed, because they belonged to said group; and hence the victims were members of this group selected as such. According to Alison Desforges's testimony, the Tutsi were killed solely on account of having been born Tutsi.

Clearly therefore, the massacres which occurred in Rwanda in 1994 had a specific objective, namely the extermination of the Tutsi, who were targeted especially because of their Tutsi origin and not because they were RPF fighters. In any case, the Tutsi children and pregnant women would, naturally, not have been among the fighters.

Consequently, the chamber concludes from all the foregoing that genocide was, indeed, committed in Rwanda in 1994 against the Tutsi as a group. Furthermore, in the opinion of the chamber, this genocide appears to have been meticulously organized. In fact, Dr Alison Desforges testifying before the chamber on 24 May 1997 talked of “centrally organized and supervised massacres”. Indeed, some evidence supports this view that the genocide had been planned. First, the existence of lists of Tutsi to be eliminated is corroborated by many testimonies. In this respect, Dr Zachariah mentioned the case of patients and nurses killed in a hospital because a soldier had a list including their names. There are also the arms caches in Kigali which Major-General Dallaire mentioned and regarding whose destruction he had sought the UN's authorization in vain. Lastly, there is the training of militiamen by the Rwandan Armed Forces and of course, the psychological preparation of the population to attack the Tutsi, which preparation was masterminded by some news media, with the RTLM at the forefront.

Finally, in response to the question posed earlier in this chapter as to whether the tragic events that took place in Rwanda in 1994 occurred solely within the context of the conflict between the RAF and the RPF, the chamber replies in the negative, since it holds that the genocide did indeed take place against the Tutsi group, alongside the conflict. The execution of this genocide was probably facilitated by the conflict, in the sense that the fighting against the RPF forces was used as a pretext for the propaganda inciting genocide against the Tutsi, by branding RPF fighters and Tutsi civilians together, through dissemination via the media of the idea that every Tutsi was allegedly an accomplice of the Inkotanyi. Very clearly, once the genocide got under way, the crime became one of the stakes in the conflict between the RPF and the RAF. In 1994, General Kagame, speaking on behalf of the RPF, declared that a cease fire could possibly not be implemented until the massacre of civilians by the government forces had stopped.

In conclusion, it should be stressed that although the genocide against the Tutsi occurred concomitantly with the above-mentioned conflict, it was, evidently, fundamentally different from the conflict. The accused himself stated during his initial appearance before the chamber, when recounting a conversation he had with one RAF officer and Silas Kubwimana, a leader of the Interahamwe, that the acts perpetrated by the Interahamwe against Tutsi civilians were not considered by the RAF officer to be of a nature to help the government armed forces in the conflict with the RPF. Note is also taken of the testimony of witness KK which is in the same vein. This witness told the chamber that while she and the children were taken away, an RAF soldier allegedly told persons who were persecuting her that “instead of going to confront the Inkotanyi at the war front, you are killing children, although children know nothing; they have never done politics”. The chamber's opinion is that the genocide was organized and planned not only by members of the RAF, but also by the political forces who were behind the “Hutu-power”, that it was executed essentially by civilians including the armed militia and

even ordinary citizens, and above all, that the majority of the Tutsi victims were non-combatants, including thousands of women and children, even foetuses. The fact that the genocide took place while the RAF was in conflict with the RPF, can in no way be considered as an extenuating circumstance for it.

This being the case, the chamber holds that the fact that genocide was indeed committed in Rwanda in 1994 and more particularly in Taba, cannot influence it in its decisions in the present case. Its sole task is to assess the individual criminal responsibility of the accused for the crimes with which he is charged, the burden of proof being on the Prosecutor. In spite of the irrefutable atrocities of the crimes committed in Rwanda, the judges must examine the facts adduced in a most dispassionate manner, bearing in mind that the accused is presumed innocent. Moreover, the seriousness of the charges brought against the accused makes it all the more necessary to examine scrupulously and meticulously all the inculpatory and exonerating evidence, in the context of a fair trial and in full respect of all the rights of the accused.

7. EVIDENTIARY MATTERS

(a) Assessment of Evidence

In its assessment of the evidence, as a general principle, the chamber has attached probative value to each testimony and each exhibit individually according to its credibility and relevance to the allegations at issue. As commonly provided for in most national criminal proceedings, the chamber has considered the charges against the accused on the basis of the testimony and exhibits offered by the parties to support or challenge the allegations made in the Indictment. In seeking to establish the truth in its judgment, the chamber has relied as well on indisputable facts and on other elements relevant to the case, such as constitutive documents pertaining to the establishment and jurisdiction of the Tribunal, even if these were not specifically tendered in evidence by the parties during trial. The chamber notes that it is not restricted under the Statute of the Tribunal to apply any particular legal system and is not bound by any national rules of evidence. In accordance with Rule 89 of its Rules of Procedure and Evidence, the chamber has applied the rules of evidence which in its view best favour a fair determination of the matter before it and are consonant with the spirit and general principles of law.

(b) Unus Testis, Nullus Testis

The chamber notes that during trial, only one testimony was presented in support of certain facts alleged in the Indictment; hence the question arises as to the principle found in Civil Law systems: *unus testis, nullus testis* (one witness is no witness) whereby corroboration of evidence is required if it is to be admitted.

Without wishing to delve into a debate on the applicability of the rule of corroboration of evidence in this judgment, the chamber recalls that the proceedings before it are conducted in accordance solely with the Statute of the Tribunal and its Rules and, as provided for by Rule 89(a), it shall not be bound by national rules of evidence. Furthermore, where evidentiary matters are concerned, the chamber is bound only to the application of the provisions of its Statute and Rules, in particular Rule 89 of the Rules which sets out the general principle of the admissibility of any relevant evidence which has probative value, provided that it is in accordance with the requisites of a fair trial.

Rule 96(i) of the Rules alone specifically deals with the issue of corroboration of testimony required by the chamber. The provisions of this Rule, which apply only to cases of testimony by victims of sexual assault, stipulate that no corroboration shall be required. In the Tadic judgment rendered by the ICTY, the Trial chamber ruled that this “Sub-rule accords to the testimony of a victim of sexual assault the same presumption of reliability as the testimony of victims of other crimes, something which had long been denied to victims of sexual assault in common law [which] certainly does not ... justify any inference that in cases of crimes other than sexual assault, corroboration is required. The proper inference is, in fact, directly to the contrary”.

In view of the above, the chamber can rule on the basis of a single testimony provided such testimony is, in its opinion, relevant and credible.

The chamber can freely assess the probative value of all relevant evidence. The chamber had thus determined that in accordance with Rule 89, any relevant evidence having probative value may be admitted into evidence, provided that it is being in accordance with the requisites of a fair trial. The chamber finds that hearsay evidence is not inadmissible *per se* and has considered such evidence, with caution, in accordance with Rule 89.

8. FACTUAL FINDINGS

The testimony of an expert witness, Alison Desforges, which has been referred to and summarised above in the “Context of the conflict” section, also indicates that Tutsi and so-called moderate Hutu civilians were targeted for attacks on a massive scale in Rwanda at the time of the events which are the subject of this indictment.

Paragraph 5 of the indictment alleges, “Unless otherwise specified, all acts and omissions set forth in this indictment took place between 1 January 1994 and 31 December 1994, in the commune of Taba, prefecture of Gitarama, territory of Rwanda”. This allegation, which supports the legal finding that the chamber has territorial and temporal jurisdiction over the crimes charged, is not contested, and the chamber finds that it has been established by the evidence presented.

In light of this evidence, the chamber finds beyond a reasonable doubt that the acts of violence which took place in Rwanda during this time were committed with the intent to destroy the Tutsi population, and that the acts of violence which took place in Taba during this time were a part of this effort.

... For these reasons, the chamber finds beyond a reasonable doubt that a widespread and systematic attack began in April 1994 in Rwanda, targeting the civilian Tutsi population and that the acts referred to in paragraphs 12-24 of the indictment were acts which formed part of this widespread and systematic attack.

... Based on the evidence presented, the chamber finds beyond a reasonable doubt that armed conflict existed in Rwanda during the events alleged in the indictment, and that the RPF was an organised armed group, under responsible command, which exercised control over territory in Rwanda and was able to carry out sustained and concerted military operations.

... In light of the evidence presented by the Prosecutor, the chamber finds beyond a reasonable doubt that all the other victims referred to in the indictment were civilians, not taking any active part in the hostilities that prevailed in 1994.

The chamber now considers paragraph 12 of the Indictment, which alleges the responsibility of the accused, his knowledge of the killings which took place in Taba between 7 April and the end of June 1994, and his failure to attempt to prevent these killings or to call for assistance from regional or national authorities.

As bourgmestre, Jean Paul Akayesu was responsible for maintaining law and public order in his commune. At least 2000 Tutsi were killed in Taba between April 7 and the end of June 1994, while he was still in power. The killings in Taba were openly committed and so widespread that, as bourgmestre, Jean Paul Akayesu must have known about them. Although he had the authority and responsibility to do so, Jean Paul Akayesu never attempted to prevent the killing of Tutsi in the commune in any way or called for assistance from regional or national authorities to quell the violence.

With regard to the allegation that at least 2000 Tutsi were killed in Taba from 7 April to the end of June 1994, the chamber notes that while many witnesses testified to widespread killings in Taba, very few witnesses were able to estimate numbers of people killed. ...and it seems to the chamber, based on the evidence of killing and mass graves, a modest estimate of the number of people killed in Taba during this period. The testimony also uniformly establishes that virtually all of these people were Tutsi. Accordingly, the chamber finds that it has been established beyond a reasonable doubt that at least 2000 Tutsi were killed in Taba from 7 April to the end of June 1994. It has also been established that the accused remained bourgmestre throughout this period.

The Indictment alleges that the killings in Taba were openly committed and so widespread that the accused must have known about them. ...The issue is not contested, and it has been established that the accused knew that killings were taking place and were widespread in Taba during the period in question.

The final allegation of paragraph 12 is that although he had the authority and responsibility to do so, Jean Paul Akayesu never attempted to prevent the killing of Tutsi in the commune in any way or called for assistance from regional or national authorities to quell the violence...

There is a substantial amount of evidence establishing that before 18 April 1994 the accused did attempt to prevent violence from taking place in the commune of Taba. ...Given the accused's testimony on this point, and its corroboration in part by the sole prosecution witness who was present at the Murambi meeting, the accused's version of events – that he did call for assistance from the national and regional authorities – must be credited.

... The chamber notes that the accused does not assert that he requested assistance from the prefect of Gitarama but rather from the Prime Minister, during the course of the meeting.

A substantial amount of evidence has been presented indicating that the conduct of the accused did, however, change significantly after the meeting on 18 April 1994, and many witnesses, including Witnesses E, W, PP, V and G, testified to the collaboration of the accused with the Interahamwe in Taba after this date.

The chamber finds that the allegations set forth in paragraph 12 cannot be fully established. The accused did take action between 7 April and 18 April to protect the citizens of his commune. It appears that he did also request assistance from national authorities at the meeting on 18 April 1994. Accordingly, the accused did attempt to prevent the killing of Tutsi in his Commune, and it cannot be said that he never did so.

Nevertheless, the chamber finds beyond a reasonable doubt that the conduct of the accused changed after 18 April 1994 and that after this date the accused did not attempt to prevent the killing of Tutsi in the commune of Taba. In fact, there is evidence that he not only knew of and witnessed killings, but that he participated in and even ordered killings. The fact that on one occasion he helped one Hutu woman protect her Tutsi children does not alter the chamber's assessment that the accused did not generally attempt to prevent the killings at all after 18 April. The accused contends that he was subject to coercion, but the chamber finds this contention greatly inconsistent with a substantial amount of concordant testimony from other witnesses. It is also inconsistent with his own pre-trial written statement. Witness C testified to having heard the accused say to an Interahamwe "I do not think that what we are doing is proper. We are going to have to pay for this blood that is being shed", a statement which indicates the accused's knowledge

of the wrongfulness of his acts and his awareness of the consequences of his deeds. For these reasons, the chamber does not accept the testimony of the accused regarding his conduct after 18 April, and finds beyond a reasonable doubt that he did not attempt to prevent killings of Tutsi after this date. Whether he had the power to do so is not at issue, as he never even tried and as there is evidence establishing beyond a reasonable doubt that he consciously chose the course of collaboration with violence against Tutsi rather than shielding them from it. ...

... On the basis of such corroborative evidence, which was not substantially disputed by the defence, the chamber is satisfied that Sylvere Karera was actually killed, in Gishyeshye, in the night of 18 to 19 April 1994.

The chamber notes however that the Prosecutor has not adduced conclusive evidence to support her allegations relating to the number and identity of the perpetrators of the killing of Sylvere Karera as well as the reasons for this murder.

... the chamber finds that the Prosecutor has not established beyond reasonable doubt that at least one of the perpetrators of the killing of Sylvere Karera was turned over alive to Akayesu, and that he failed to take any measures to have him arrested. ...

The chamber finds that on 19 April 1994, the accused was searching for Ephrem Karangwa. At approximately 1am, on that day, Karangwa received a report that at a meeting led by the accused, plans were made to kill him and other Tutsi. ...

The chamber finds that Karangwa gave a truthful account of events actually witnessed by him and that he did so without exaggeration or hostility. The chamber is satisfied that the witness could reasonably have seen and heard the matters to which he testified. ...

The chamber has not found any evidence that the accused blew the whistle to alert local residents to the attempted escape of the brothers but finds as proven beyond a reasonable doubt that the accused was present at both houses, that he was searching for Karangwa, that the houses of Karangwa and his mother were destroyed in his presence by men under his control, that he went to search the house of Karangwa's brother-in-law in Musimbira and found Karangwa's brothers at this house, that he participated in the killings of the three brothers, named, Simon Mutijima, Thadee Uwanyiligira, and Jean Chrysostome Gakuba, by ordering their deaths and being present when they were killed by policemen, under the immediate authority of the accused as bourgmestre of Taba commune and in response to his order made to the bourgmestre of Musambira...

...The chamber cannot accept Akayesu's assertion with regard to the killing of teachers. Further, the chamber notes that Akayesu did not specifically contest the

allegations that he ordered the militia and local population to kill intellectuals and influential people...

The chamber finds that it has been proved beyond reasonable doubt that on or about 19 April 1994, Akayesu ordered the local people and Interahamwe to kill intellectual people'. It has been proved beyond reasonable doubt that, after the killing of the refugees, Akayesu instructed the local people and Interahamwe near him at the bureau communal to fetch the one who remains', a professor by the name of Samuel, and that consequent to this instruction, a certain professor by the name of Samuel was brought to the bureau communal. It has been proved beyond reasonable doubt that Samuel was then killed by the local people and Interahamwe with a machete blow to the neck. The chamber finds that it has been proved beyond reasonable doubt that teachers from the commune of Taba were killed pursuant to the instructions of Akayesu. The chamber finds it has been proved beyond reasonable doubt that amongst the teachers who were killed were Tharcisse, Theogene, Phoebe Uwineze and her fiancé. It has been proved beyond reasonable doubt that Tharcisse was killed in the presence of Akayesu. The chamber finds it has been proved beyond reasonable doubt that the victims were all killed by local people and Interahamwe using machetes and agricultural tools on the road in front of the bureau communal. The chamber finds that it has not been proved beyond reasonable doubt that Akayesu ordered the killing of influential people, nor that the victims were teachers from the secondary school of Taba.

The chamber finds that it has been proved beyond reasonable doubt that the teachers were killed because they were Tutsi ...

On the basis of consistent evidence and the facts confirmed by the accused himself, the chamber is satisfied beyond a reasonable doubt that the accused was present in Gishyeshye, during the early hours of 19 April 1994, that he joined the crowd gathered around the body of a young member of the Interahamwe militia, and that he took that opportunity to address the people. The chamber finds that the accused did not convene the meeting, but that he joined an already formed gathering. Furthermore, on the basis of consistent evidence, the chamber is satisfied beyond a reasonable doubt that on that occasion, the accused, by virtue of his functions as bourgmestre and the authority he held over the population, did lead the crowd and the ensuing proceedings.

With regard to the Prosecution allegation that the accused sanctioned the death of Sylvere Karera, the chamber finds that the accused himself admitted to having condemned the death of a young Interahamwe who had allegedly killed Karera, but failing to mention that he also condemned the death of Karera. The chamber nevertheless points out that failure to condemn is not tantamount to approval in this case. However, on the basis of testimonies by witnesses V and Z, the chamber finds that the accused could very well have attributed the death of Sylvere Karera to his alleged complicity with the Inkotanyi and may have added that Karera had

been justly killed. The chamber however finds that no other evidence corroborated the testimony of witness V, whereas some ten witnesses had been questioned about facts relating to the murder of Sylvestre Karera and the ensuing meeting at which the accused spoke. Consequently, the chamber holds that in the absence of conclusive evidence, the Prosecution has failed to establish beyond a reasonable doubt that the accused publicly sanctioned the death of Sylvère Karera at the Gishyeshye gathering.

With regard to the allegation that the accused urged the population, during the said gathering, to eliminate the accomplices of the RPF, after considering the weight of all supporting and corroborative evidence, the chamber is satisfied beyond a reasonable doubt that the accused clearly called on the population to unite and eliminate the sole enemy: accomplices of the Inkotanyi. On the basis of consistent evidence heard throughout the trial and the information provided by Dr Ruzindana, appearing as an expert witness on linguistic issues, the chamber is satisfied beyond a reasonable doubt that the population construed the accused's call as a call to kill the Tutsi. The chamber is satisfied beyond a reasonable doubt that the accused was himself fully aware of the impact of his statement on the crowd and of the fact that his call to wage war against Inkotanyi accomplices could be construed as one to kill the Tutsi in general.

Finally, relying on substantial evidence which was not essentially called into question by the defence, and as it was confirmed by the accused, the chamber is satisfied beyond a reasonable doubt that there was a causal link between the statement of the accused at the 19 April 1994 gathering and the ensuing widespread killings in Taba...

The chamber finds that it has been proved beyond reasonable doubt that Akayesu did cite Ephrem Karangwa during the Gishyeshye meeting. It has also been established beyond a reasonable doubt he did so knowing of the consequences of naming someone as an RPF accomplice in the temporal context of the events alleged in the Indictment.

However, the chamber is of the opinion that the evidence presented in this matter does not support the specific allegations that Akayesu named Juvénal Rukundakuvuga and Emmanuel Sempabwa. The evidence presented shows only an implicit, yet remote, allusion by Akayesu during the Gishyeshye gathering to these two individuals, and does not demonstrate that Akayesu expressly named them. Hence, the chamber finds that it has not been proved beyond reasonable doubt that Akayesu named Juvénal Rukundakuvuga or Emmanuel Sempabwa during the Gishyeshye gathering on 19 April 1994, and that their fates were consequent upon the utterances of Akayesu at the Gishyeshye gathering...

The chamber finds that on 19 April 1994, Victim U (Witness K) was threatened by the accused at the bureau communal. She went to the bureau

communal because she had been summoned there by the accused. She was questioned by the accused in the presence of men whom she had just seen killing Tutsi at the bureau communal. In response to a question from the killers, Victim U heard the accused tell them that she would be killed after she was questioned about the secrets of the Inkotanyi. The accused then questioned Victim U and threatened that she would be killed if she did not divulge information about her cooperation with the Inkotanyi. The accused then locked Victim U in her office and left. When he returned in the afternoon, he resumed questioning Victim U and again threatened that she would be killed if she did not provide information about the Inkotanyi. He left again and returned at midnight with a police officer. The accused asked her whether she would tell them what she knew and when she said she knew nothing, he said, "I wash my hands of your blood." He then asked the driver and the police to accompany her home.

... The chamber notes that the accused in his testimony confirmed the presence of Victim U at the bureau communal on 19 April 1994. The chamber does not accept his explanation of her presence there or his actions. If he intended to protect her, as he suggested, why did he take her key from her, why did he question her about the Inkotanyi, and why did he leave her there until midnight? The accused did not address any of these questions or specifically deny that he did any of these things. He did not even deny specifically that he told the others in her presence that she would be killed after questioning or that he threatened her when he questioned her. The chamber notes that there is no evidence to suggest that the accused threatened the husband or child of Victim U.

With regard to the allegations set forth in paragraph 17 of the Indictment, the chamber is unable to find, beyond a reasonable doubt, that the accused ordered the interrogation and beating of Victim X (Witness U) on 19 April 1994...

With regard to the search for Alexia, wife of Ntereye, the chamber finds that at on the evening of 20 April 1994, the accused went with two Interahamwe named Francois and Singuranayo and one communal police officer named Mugenzi to the house of Victim Y (Witness N), a [68] year old woman at the time. Mugenzi took her by the arm to the door and hit her on the head with the barrel of his rifle. Victim Y was then forcibly taken to the accused, who ordered her to lie down. In the presence of the accused, Victim Y was beaten by the communal police officer Mugenzi who stepped on her neck, pushed the butt of his rifle into her neck, and stomped on her. Victim Y was also beaten by the accused, who hit her with a club on her back. She was interrogated by Mugenzi and the accused about the whereabouts of Alexia, the wife of Ntereye, a university professor. She was then taken to Buguli, where the accused made her lie down in front of the vehicle and threatened to run her over. At the mine, in the presence of the accused, she was also threatened and interrogated by Mugenzi, who bound her arms and legs and stomped on her with his foot. The others stomped on her as well.

Having carefully reviewed the testimony of the Prosecution witnesses regarding sexual violence, the chamber finds that there is sufficient credible evidence to establish beyond a reasonable doubt that during the events of 1994, Tutsi girls and women were subjected to sexual violence, beaten and killed on or near the bureau communal premises, as well as elsewhere in the commune of Taba. The chamber notes that much of the sexual violence took place in front of large numbers of people, and that all of it was directed against Tutsi women.

With a few exceptions, most of the rapes and all of the other acts of sexual violence described by the Prosecution witnesses were committed by Interahamwe...

In considering the role of the accused in the sexual violence which took place and the extent of his direct knowledge of incidents of sexual violence, the chamber has taken into account only evidence which is direct and unequivocal. Witness H testified that the accused was present during the rape of Tutsi women outside the compound of the bureau communal, but as she could not confirm that he was aware that the rapes were taking place, the chamber discounts this testimony in its assessment of the evidence. Witness PP recalled the accused directing the Interahamwe to take Alexia and her two nieces to Kinihira, saying "Don't you know where killings take place, where the others have been killed?"...

On the basis of the evidence set forth herein, the chamber finds beyond a reasonable doubt that the accused had reason to know and in fact knew that sexual violence was taking place on or near the premises of the bureau communal, and that women were being taken away from the bureau communal and sexually violated. ... On the first occasion he was looking at them, and on the second occasion he was standing at the entrance to the cultural center. On this second occasion, he said, "Never ask me again what a Tutsi woman tastes like."...

9. THE LAW

The question which arises at this stage is whether, if the chamber is convinced beyond a reasonable doubt that a given factual allegation set out in the Indictment has been established, it may find the accused guilty of all of the crimes charged in relation to those facts or only one. The reason for posing this question is that it might be argued that the accumulation of criminal charges offends against the principle of double jeopardy or a substantive *non bis in idem* principle in criminal law. Thus an accused who is found guilty of both genocide and crimes against humanity in relation to the same set of facts may argue that he has been twice judged for the same offence, which is generally considered impermissible in criminal law.

The chamber notes that this question has been posed, and answered, by the Trial chamber of the ICTY in the first case before that Tribunal, *The Prosecutor v Dusko Tadic*. Trial chamber II, confronted with this issue, stated:

“In any event, since this is a matter that will only be relevant insofar as it might affect penalty, it can best be dealt with if and when matters of penalty fall for consideration. What can, however, be said with certainty is that penalty cannot be made to depend upon whether offences arising from the same conduct are alleged cumulatively or in the alternative. What is to be punished by penalty is proven criminal conduct and that will not depend upon technicalities of pleading”. (*Prosecutor v Tadic*, Decision on defence Motion on Form of the Indictment at page 10 (number IT-94-1-T, TChII, 14 November 1995).

In that case, when the matter reached the sentencing stage, the Trial chamber dealt with the matter of cumulative criminal charges by imposing *concurrent* sentences for each cumulative charge. Thus, for example, in relation to one particular beating, the accused received 7 years' imprisonment for the beating as a crime against humanity, and a 6 year concurrent sentence for the same beating as a violation of the laws or customs of war.

The chamber takes due note of the practice of the ICTY. This practice was also followed in the *Barbie* case, where the French *Cour de Cassation* held that a single event could be qualified both as a crime against humanity and as a war crime.

It is clear that the practice of concurrent sentencing ensures that the accused is not twice punished for the same acts. Notwithstanding this absence of prejudice to the accused, it is still necessary to justify the prosecutorial practice of accumulating criminal charges.

The chamber notes that in Civil Law systems, including that of Rwanda, there exists a principle known as *concours ideal d'infractions* which permits multiple convictions for the same act under certain circumstances. ...

On the basis of national and international law and jurisprudence, the chamber concludes that it is acceptable to convict the accused of two offences in relation to the same set of facts in the following circumstances:

- (1) where the offences have different elements; or
- (2) where the provisions creating the offences protect different interests; or
- (3) where it is necessary to record a conviction for both offences in order fully to describe what the accused did. However, the chamber finds that it is not justifiable to convict an accused of two offences in relation to the same set of facts where:
 - (a) one offence is a lesser included offence of the other, for example, murder and grievous bodily harm, robbery and theft, or rape and indecent assault; or

- (b) where one offence charges accomplice liability and the other offence charges liability as a principal, e.g. genocide and complicity in genocide.

Having regard to its Statute, the chamber believes that the offences under the Statute – genocide, crimes against humanity, and violations of article 3 common to the Geneva Conventions and of Additional Protocol II – have different elements and, moreover, are intended to protect different interests. The crime of genocide exists to protect certain groups from extermination or attempted extermination. The concept of crimes against humanity exists to protect civilian populations from persecution. The idea of violations of article 3 common to the Geneva Conventions and of Additional Protocol II is to protect non-combatants from war crimes in civil war. These crimes have different purposes and are, therefore, never co-extensive. Thus it is legitimate to charge these crimes in relation to the same set of facts. It may, additionally, depending on the case, be necessary to record a conviction for more than one of these offences in order to reflect what crimes an accused committed. If, for example, a general ordered that all prisoners of war belonging to a particular ethnic group should be killed, with the intent thereby to eliminate the group, this would be both genocide and a violation of common article 3, although not necessarily a crime against humanity. Convictions for genocide and violations of common article 3 would accurately reflect the accused general's course of conduct.

Conversely, the chamber does not consider that any of genocide, crimes against humanity, and violations of article 3 common to the Geneva Conventions and of Additional Protocol II are lesser included forms of each other. The ICTR Statute does not establish a hierarchy of norms, but rather all three offences are presented on an equal footing. While genocide may be considered the gravest crime, there is no justification in the Statute for finding that crimes against humanity or violations of common article 3 and additional protocol II are in all circumstances alternative charges to genocide and thus lesser included offences. As stated, and it is a related point, these offences have different constituent elements. Again, this consideration renders multiple convictions for these offences in relation to the same set of facts permissible. ...

The chamber holds that it is necessary to recall that criminal intent is the moral element required for any crime and that, where the objective is to ascertain the individual criminal responsibility of a person accused of crimes falling within the jurisdiction of the chamber, such as genocide, crimes against humanity and violations of article 3 Common to the Geneva Conventions and of Additional Protocol II thereto, it is certainly proper to ensure that there has been malicious intent, or, at least, ensure that negligence was so serious as to be tantamount to acquiescence or even malicious intent.

The chamber therefore finds that in the case of civilians, the application of the principle of individual criminal responsibility, enshrined in article 6(3), to civilians remains contentious. Against this background, the chamber holds that it is appropriate to assess on a case by case basis the power of authority actually devolved upon the accused in order to determine whether or not he had the power to take all necessary and reasonable measures to prevent the commission of the alleged crimes or to punish the perpetrators thereof. ...

The chamber notes that Rwanda acceded, by legislative decree, to the Convention on Genocide on 12 February 1975. Thus, punishment of the crime of genocide did exist in Rwanda in 1994, at the time of the acts alleged in the Indictment, and the perpetrator was liable to be brought before the competent courts of Rwanda to answer for this crime.

Contrary to popular belief, the crime of genocide does not imply the actual extermination of group in its entirety, but is understood as such once any one of the acts mentioned in article 2(2)(a) through 2(2)(e) is committed with the specific intent to destroy “in whole or in part” a national, ethnical, racial or religious group.

Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in “the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”.

Thus, for a crime of genocide to have been committed, it is necessary that one of the acts listed under article 2(2) of the Statute be committed, that the particular act be committed against a specifically targeted group, it being a national, ethnical, racial or religious group. Consequently, in order to clarify the constitutive elements of the crime of genocide, the chamber will first state its findings on the acts provided for under article 2(2)(a) through article 2(2)(e) of the Statute, the groups protected by the Genocide Convention, and the special intent or *dolus specialis* necessary for genocide to take place.

10. KILLING MEMBERS OF THE GROUP (PARAGRAPH (A))

With regard to article 2(2)(a) of the Statute, like in the Genocide Convention, the chamber notes that the said paragraph states “*meurtre*” in the French version while the English version states “killing”. The Trial chamber is of the opinion that the term “killing” used in the English version is too general, since it could very well include both intentional and unintentional homicides, whereas the term “*meurtre*”, used in the French version, is more precise. It is accepted that there is murder when death has been caused with the intention to do so, as provided for,

incidentally, in the Penal Code of Rwanda which stipulates in its article 311 that “Homicide committed with intent to cause death shall be treated as murder”.

Given the presumption of innocence of the accused, and pursuant to the general principles of criminal law, the chamber holds that the version more favourable to the accused should be upheld and finds that article 2(2)(a) of the Statute must be interpreted in accordance with the definition of murder given in the Penal Code of Rwanda, according to which “*meurtre*” (killing) is homicide committed with the intent to cause death. The chamber notes in this regard that the *travaux préparatoires* of the Genocide Convention, show that the proposal by certain delegations that premeditation be made a necessary condition for there to be genocide, was rejected, because some delegates deemed it unnecessary for premeditation to be made a requirement; in their opinion, by its constitutive physical elements, the very crime of genocide, necessarily entails premeditation.

11. CAUSING SERIOUS BODILY OR MENTAL HARM TO MEMBERS OF THE GROUP (PARAGRAPH B)

Causing serious bodily or mental harm to members of the group does not necessarily mean that the harm is permanent and irremediable.

In the Adolf Eichmann case, who was convicted of crimes against the Jewish people, genocide under another legal definition, the District Court of Jerusalem stated in its judgment of 12 December 1961, that serious bodily or mental harm of members of the group can be caused:

“by the enslavement, starvation, deportation and persecution ... and by their detention in ghettos, transit camps and concentration camps in conditions which were designed to cause their degradation, deprivation of their rights as human beings, and to suppress them and cause them inhumane suffering and torture.”

For purposes of interpreting article 2(2)(b) of the Statute, the chamber takes serious bodily or mental harm, without limiting itself thereto, to mean acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution.

12. DELIBERATELY INFLECTING ON THE GROUP CONDITIONS OF LIFE CALCULATED TO BRING ABOUT ITS PHYSICAL DESTRUCTION IN WHOLE OR IN PART (PARAGRAPH C)

The chamber holds that the expression deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, should be construed as the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction.

For purposes of interpreting article 2(2)(c) of the Statute, the chamber is of the opinion that the means of deliberate inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or part, include, *inter alia*, subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement.

13. IMPOSING MEASURES INTENDED TO PREVENT BIRTHS WITHIN THE GROUP (PARAGRAPH D)

For purposes of interpreting article 2(2)(d) of the Statute, the chamber holds that the measures intended to prevent births within the group, should be construed as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages. In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group.

Furthermore, the chamber notes that measures intended to prevent births within the group may be physical, but can also be mental. For instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.

14. FORCIBLY TRANSFERRING CHILDREN OF THE GROUP TO ANOTHER GROUP (PARAGRAPH E)

With respect to forcibly transferring children of the group to another group, the chamber is of the opinion that, as in the case of measures intended to prevent births, the objective is not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another.

Since the special intent to commit genocide lies in the intent to “destroy, in whole or in part, a national, ethnical, racial or religious group, as such”, it is necessary to consider a definition of the group as such. Article 2 of the Statute, just like the Genocide Convention, stipulates four types of victim groups, namely national, ethnical, racial or religious groups.

On reading through the *travaux préparatoires* of the Genocide Convention, it appears that the crime of genocide was allegedly perceived as targeting only “stable” groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more “mobile” groups which one

joins through individual voluntary commitment, such as political and economic groups. Therefore, a common criterion in the four types of groups protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner.

Based on the *Nottebohm* decision rendered by the International Court of Justice, the chamber holds that a national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.

An ethnic group is generally defined as a group whose members share a common language or culture.

The conventional definition of racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors.

The religious group is one whose members share the same religion, denomination or mode of worship.

Moreover, the chamber considered whether the groups protected by the Genocide Convention, echoed in article 2 of the Statute, should be limited to only the four groups expressly mentioned and whether they should not also include any group which is stable and permanent like the said four groups. In other words, the question that arises is whether it would be impossible to punish the physical destruction of a group as such under the Genocide Convention, if the said group, although stable and membership is by birth, does not meet the definition of any one of the four groups expressly protected by the Genocide Convention. In the opinion of the chamber, it is particularly important to respect the intention of the drafters of the Genocide Convention, which according to the *travaux préparatoires*, was patently to ensure the protection of any stable and permanent group.

As stated above, the crime of genocide is characterized by its *dolus specialis*, or special intent, which lies in the fact that the acts charged, listed in article 2(2) of the Statute, must have been “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”.

Special intent is a well-known criminal law concept in the Roman-continental legal systems. It is required as a constituent element of certain offences and demands that the perpetrator have the clear intent to cause the offence charged. According to this meaning, special intent is the key element of an intentional offence, which offence is characterized by a psychological relationship between the physical result and the mental state of the perpetrator.

As observed by the representative of Brazil during the *travaux préparatoires* of the Genocide Convention:

“genocide [is] characterised by the factor of particular intent to destroy a group. In the absence of that factor, whatever the degree of atrocity of an act and however similar it might be to the acts described in the convention, that act could still not be called genocide.”

With regard to the crime of genocide, the offender is culpable only when he has committed one of the offences charged under article 2(2) of the Statute with the clear intent to destroy, in whole or in part, a particular group. The offender is culpable because he knew or should have known that the act committed would destroy, in whole or in part, a group.

In concrete terms, for any of the acts charged under article 2(2) of the Statute to be a constitutive element of genocide, the act must have been committed against one or several individuals, because such individual or individuals were members of a specific group, and specifically because they belonged to this group. Thus, the victim is chosen not because of his individual identity, but rather on account of his membership of a national, ethnical, racial or religious group. The victim of the act is therefore a member of a group, chosen as such, which, hence, means that the victim of the crime of genocide is the group itself and not only the individual.

The perpetration of the act charged therefore extends beyond its actual commission, for example, the murder of a particular individual, for the realisation of an ulterior motive, which is to destroy, in whole or part, the group of which the individual is just one element.

On the issue of determining the offender's specific intent, the chamber considers that intent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact. The chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the chamber to infer the genocidal intent of a particular act.

Trial chamber I of the International Criminal Tribunal for the former Yugoslavia also stated that the specific intent of the crime of genocide:

“may be inferred from a number of facts such as the general political doctrine which gave rise to the acts possibly covered by the definition in article 4, or the repetition of destructive and discriminatory acts. The intent may also be inferred from the perpetration of acts which violate, or which the perpetrators themselves

consider to violate the very foundation of the group- acts which are not in themselves covered by the list in article 4(2) but which are committed as part of the same pattern of conduct.”

Thus, in the matter brought before the International Criminal Tribunal for the former Yugoslavia, the Trial chamber, in its findings, found that:

“this intent derives from the combined effect of speeches or projects laying the groundwork for and justifying the acts, from the massive scale of their destructive effect and from their specific nature, which aims at undermining what is considered to be the foundation of the group.”

15. COMPLICITY IN GENOCIDE

(a) The Crime of Complicity in Genocide, punishable under article 2(3)(e) of the Statute:

Under article 2(3)(e) of the Statute, the chamber shall have the power to prosecute persons who have committed complicity in genocide. The Prosecutor has charged Akayesu with such a crime under count 2 of the Indictment.

Principle VII of the “Nuremberg Principles” reads:

“complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.”

Thus, participation by complicity in the most serious violations of international humanitarian law was considered a crime as early as Nuremberg.

The chamber notes that complicity is viewed as a form of criminal participation by all criminal law systems, notably, under the Anglo-Saxon system (or Common Law) and the Roman-Continental system (or Civil Law). Since the accomplice to an offence may be defined as someone who associates himself in an offence committed by another, complicity necessarily implies the existence of a principal offence.

According to one school of thought, complicity is borrowed criminality' (criminalité d'emprunt). In other words, the accomplice borrows the criminality of the principal perpetrator. By borrowed criminality, it should be understood that the physical act which constitutes the act of complicity does not have its own inherent criminality, but rather it borrows the criminality of the act committed by the principal perpetrator of the criminal enterprise. Thus, the conduct of the accomplice emerges as a crime when the crime has been consummated by the principal perpetrator. The accomplice has not committed an autonomous crime, but has merely facilitated the criminal enterprise committed by another.

Therefore, the issue before the chamber is whether genocide must actually be committed in order for any person to be found guilty of complicity in genocide. The chamber notes that, as stated above, complicity can only exist when there is a punishable, principal act, in the commission of which the accomplice has associated himself. Complicity, therefore, implies a predicate offence committed by someone other than the accomplice.

Consequently, the chamber is of the opinion that in order for an accused to be found guilty of complicity in genocide, it must, first of all, be proven beyond a reasonable doubt that the crime of genocide has, indeed, been committed.

The issue thence is whether a person can be tried for complicity even where the perpetrator of the principal offence himself has not been tried. Under article 89 of the Rwandan Penal Code, accomplices:

“may be prosecuted even where the perpetrator may not face prosecution for personal reasons, such as double jeopardy, death, insanity or non-identification”[unofficial translation].

As far as the chamber is aware, all criminal systems provide that an accomplice may also be tried, even where the principal perpetrator of the crime has not been identified, or where, for any other reasons, guilt could not be proven.

The chamber notes that the logical inference from the foregoing is that an individual cannot thus be both the principal perpetrator of a particular act and the accomplice thereto. An act with which an accused is being charged cannot, therefore, be characterized both as an act of genocide and an act of complicity in genocide as pertains to this accused. Consequently, since the two are mutually exclusive, the same individual cannot be convicted of both crimes for the same act.

As regards the physical elements of complicity in genocide (*Actus Reus*), three forms of accomplice participation are recognized in most criminal Civil Law systems: complicity by instigation, complicity by aiding and abetting, and complicity by procuring means. It should be noted that the Rwandan Penal Code includes two other forms of participation, namely, incitement to commit a crime through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, and complicity by harbouring or aiding a criminal. Indeed, according to article 91 of the Rwandan Penal Code:

“An accomplice shall mean:

- (1) A person or persons who by means of gifts, promises, threats, abuse of authority or power, culpable machinations or artifice, directly incite(s) to commit such action or order(s) that such action be committed.

- (2) A person or persons who procure(s) weapons, instruments or any other means which are used in committing such action with the knowledge that they would be so used.
- (3) A person or persons who knowingly aid(s) or abet(s) the perpetrator or perpetrators of such action in the acts carried out in preparing or planning such action or in effectively committing it.
- (4) A person or persons who, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings or through the public display of placards or posters, directly incite(s) the perpetrator or perpetrators to commit such an action without prejudice to the penalties applicable to those who incite others to commit offences, even where such incitement fails to produce results.
- (5) A person or persons who harbour(s) or aid(s) perpetrators under the circumstances provided for under article 257 of this Code.” [unofficial translation]

The chamber notes, first of all, that the said article 91 of the Rwandan Penal Code draws a distinction between “*instigation*” (instigation), on the one hand, as provided for by paragraph 1 of said article, and “*incitation*” (incitement), on the other, which is referred to in paragraph 4 of the same article. The chamber notes in this respect that, as pertains to the crime of genocide, the latter form of complicity, i.e. by incitement, is the offence which under the Statute is given the specific legal definition of “direct and public incitement to commit genocide,” punishable under article 2(3)(c), as distinguished from “complicity in genocide.” The findings of the chamber with respect to the crime of direct and public incitement to commit genocide will be detailed below. That said, instigation, which according to article 91 of the Rwandan Penal Code, assumes the form of incitement or instruction to commit a crime, only constitutes complicity if it is accompanied by, “gifts, promises, threats, abuse of authority or power, machinations or culpable artifice”. In other words, under the Rwandan Penal Code, unless the instigation is accompanied by one of the aforesaid elements, the mere fact of prompting another to commit a crime is not punishable as complicity, even if such a person committed the crime as a result.

The ingredients of complicity under Common Law do not appear to be different from those under Civil Law. To a large extent, the forms of accomplice participation, namely “aid and abet, counsel and procure”, mirror those conducts characterized under Civil Law as “*l'aide et l'assistance, la fourniture des moyens*”.

Complicity by aiding or abetting implies a positive action which excludes, in principle, complicity by failure to act or omission. Procuring means is a very common form of complicity. It covers those persons who procured weapons,

instruments or any other means to be used in the commission of an offence, with the full knowledge that they would be used for such purposes.

(For the purposes of interpreting article 2(3)(e) of the Statute, which does not define the concept of complicity, the chamber is of the opinion that it is necessary to define complicity as per the Rwandan Penal Code, and to consider the first three forms of criminal participation referred to in article 91 of the Rwandan Penal Code as being the elements of complicity in genocide, thus:

- (a) complicity by *procuring means*, such as weapons, instruments or any other means, used to commit genocide, with the accomplice knowing that such means would be used for such a purpose;
- (b) complicity by knowingly *aiding or abetting* a perpetrator of a genocide in the planning or enabling acts thereof;
- (c) complicity by *instigation*, for which a person is liable who, though not directly participating in the crime of genocide crime, gave instructions to commit genocide, through gifts, promises, threats, abuse of authority or power, machinations or culpable artifice, or who directly incited to commit genocide.[emphasis mine]

The intent or mental element of complicity implies in general that, at the moment he acted, the accomplice knew of the assistance he was providing in the commission of the principal offence. In other words, the accomplice must have acted knowingly.

Moreover, as in all Criminal Civil Law systems, under Common Law, notably English law, generally, the accomplice need not even wish that the principal offence be committed. In the case of *National Coal Board v Gamble*, Justice Devlin stated:

“an indifference to the result of the crime does not of itself negate abetting. If one man deliberately sells to another a gun to be used for murdering a third, he may be indifferent about whether the third lives or dies and interested only the cash profit to be made out of the sale, but he can still be an aider and abettor.”

In 1975, the English House of Lords also upheld this definition of complicity, when it held that willingness to participate in the principal offence did not have to be established. As a result, anyone who knowing of another's criminal purpose, voluntarily aids him or her in it, can be convicted of complicity even though he regretted the outcome of the offence.

As far as genocide is concerned, the intent of the accomplice is thus to knowingly aid or abet one or more persons to commit the crime of genocide. Therefore, the chamber is of the opinion that an accomplice to genocide need not necessarily possess the *dolus specialis* of genocide, namely the specific intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such.

Thus, if for example, an accused knowingly aided or abetted another in the commission of a murder, while being unaware that the principal was committing such a murder, with the intent to destroy, in whole or in part, the group to which the murdered victim belonged, the accused could be prosecuted for complicity in murder, and certainly not for complicity in genocide. However, if the accused knowingly aided and abetted in the commission of such a murder while he knew or had reason to know that the principal was acting with genocidal intent, the accused would be an accomplice to genocide, even though he did not share the murderer's intent to destroy the group.

This finding by the chamber comports with the decisions rendered by the District Court of Jerusalem on 12 December 1961 and the Supreme Court of Israel on 29 May 1962 in the case of Adolf Eichmann. Since Eichmann raised the argument in his defence that he was a “small cog” in the Nazi machine, both the District Court and the Supreme Court dealt with accomplice liability and found that:

“... even a small cog, even an insignificant operator, is under our criminal law liable to be regarded as an accomplice in the commission of an offence, in which case he will be dealt with as if he were the actual murderer or destroyer.”

The District Court accepted that Eichmann did not personally devise the “Final Solution” himself, but nevertheless, as the head of those engaged in carrying out the “Final Solution” – “acting in accordance with the directives of his superiors, but [with] wide discretionary powers in planning operations on his own initiative,” he incurred individual criminal liability for crimes against the Jewish people, as much as his superiors. Likewise, with respect to his subordinates who actually carried out the executions, “... the legal and moral responsibility of he who delivers up the victim to his death is, in our opinion, no smaller, and may be greater, than the responsibility of he who kills the victim with his own hands”. The District Court found that participation in the extermination plan with knowledge of the plan rendered the person liable “as an accomplice to the extermination of all ... victims from 1941 to 1945, irrespective of the extent of his participation”.

The findings of the Israeli courts in this case support the principle that the *mens rea*, or special intent, required for complicity in genocide is *knowledge* of the genocidal plan, coupled with the *actus reus* of participation in the execution of such plan. Crucially, then, it does not appear that the specific intent to commit the crime of genocide, as reflected in the phrase “with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such,” is required for complicity or accomplice liability.

In conclusion, the chamber is of the opinion that an accused is liable as an accomplice to genocide if he knowingly aided or abetted or instigated one or more persons in the commission of genocide, while knowing that such a person or

persons were committing genocide, even though the accused himself did not have the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

At this juncture, the chamber will address another issue, namely that which, with respect to complicity in genocide covered under article 2(3)(e) of the Statute, may arise from the forms of participation listed in article 6 of the Statute entitled, "Individual Criminal Responsibility," and more specifically, those covered under paragraph 1 of the same article. Indeed, under article 6(1), "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime." Such forms of participation, which are summarized in the expression "... or otherwise aided or abetted ..." are similar to the material elements of complicity, though they in and of themselves, characterize the crimes referred to in articles 2 to 4 of the Statute, which include namely genocide.

Consequently, where a person is accused of aiding and abetting, planning, preparing or executing genocide, it must be proven that such a person acted with specific genocidal intent, i.e. the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such, whereas, as stated above, there is no such requirement to establish accomplice liability in genocide.

Another difference between complicity in genocide and the principle of abetting in the planning, preparation or execution a genocide as per article 6(1), is that, in theory, complicity requires a positive act, i.e. an act of commission, whereas aiding and abetting may consist in failing to act or refraining from action. Thus, in the *Jefferson* and *Coney* cases, it was held that "The accused ... only accidentally present ... must know that his presence is actually encouraging the principal(s)". Similarly, the French Court of Cassation found that:

"A person who, by his mere presence in a group of aggressors provided moral support to the assailants, and fully supported the criminal intent of the group, is liable as an accomplice" [unofficial translation].

The International Criminal Tribunal for the Former Yugoslavia also concluded in the *Tadic* judgment that:

"if the presence can be shown or inferred, by circumstantial or other evidence, to be knowing and to have a direct and substantial effect on the commission of the illegal act, then it is sufficient on which to base a finding of participation and assign the criminal culpability that accompanies it."

16. DIRECT AND PUBLIC INCITEMENT TO COMMIT GENOCIDE

(a) **The crime of direct and public incitement to commit genocide, punishable under article 2(3)(c) of the statute**

Under count 4, the Prosecutor charges Akayesu with direct and public incitement to commit genocide, a crime punishable under article 2(3)(c) of the Statute.

Perhaps the most famous conviction for incitement to commit crimes of international dimension was that of Julius Streicher by the Nuremberg Tribunal for the virulently anti-Semitic articles which he had published in his weekly newspaper *Der Stürmer*. The Nuremberg Tribunal found that: "Streicher's incitement to murder and extermination, at the time when Jews in the East were being killed under the most horrible conditions, clearly constitutes persecution on political and racial grounds in connection with War Crimes, as defined by the Charter, and constitutes a Crime against Humanity".

At the time the Convention on Genocide was adopted, the delegates agreed to expressly spell out direct and public incitement to commit genocide as a specific crime, in particular, because of its critical role in the planning of a genocide, with the delegate from the USSR stating in this regard that, "It was impossible that hundreds of thousands of people should commit so many crimes unless they had been incited to do so and unless the crimes had been premeditated and carefully organized. He asked how in those circumstances, the inciters and organizers of the crime could be allowed to escape punishment, when they were the ones really responsible for the atrocities committed".

Under Common law systems, incitement tends to be viewed as a particular form of criminal participation, punishable as such. Similarly, under the legislation of some Civil law countries, including Argentina, Bolivia, Chili, Peru, Spain, Uruguay and Venezuela, provocation, which is similar to incitement, is a specific form of participation in an offence; but in most Civil law systems, incitement is most often treated as a form of complicity.

The Rwandan Penal Code is one such legislation. Indeed, as stated above, in the discussion on complicity in genocide, it does provide that direct and public incitement or provocation is a form of complicity. In fact, article 91 subparagraph 4 provides that an accomplice shall mean "A person or persons who, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings or through the public display of placards or posters, directly incite(s) the perpetrator or perpetrators to commit such an action without prejudice to the penalties applicable to those

who incite others to commit offences, even where such incitement fails to produce results”.

Under the Statute, direct and public incitement is expressly defined as a specific crime, punishable as such, by virtue of article 2(3)(c). With respect to such a crime, the chamber deems it appropriate to first define the three terms: incitement, direct and public.

Incitement is defined in Common Law systems as encouraging or persuading another to commit an offence. One line of authority in Common law would also view threats or other forms of pressure as a form of incitement. As stated above, Civil law systems punish direct and public incitement assuming the form of provocation, which is defined as an act intended to directly provoke another to commit a crime or a misdemeanour through speeches, shouting or threats, or any other means of audiovisual communication. Such a provocation, as defined under Civil law, is made up of the same elements as direct and public incitement to commit genocide covered by article 2 of the Statute, that is to say it is both direct and public.

The public element of incitement to commit genocide may be better appreciated in light of two factors: the place where the incitement occurred and whether or not assistance was selective or limited. A line of authority commonly followed in Civil law systems would regard words as being public where they were spoken aloud in a place that were public by definition. According to the International Law Commission, public incitement is characterized by a call for criminal action to a number of individuals in a public place or to members of the general public at large by such means as the mass media, for example, radio or television. It should be noted in this respect that at the time Convention on Genocide was adopted, the delegates specifically agreed to rule out the possibility of including private incitement to commit genocide as a crime, thereby underscoring their commitment to set aside for punishment only the truly public forms of incitement.

The “direct” element of incitement implies that the incitement assume a direct form and specifically provoke another to engage in a criminal act, and that more than mere vague or indirect suggestion goes to constitute direct incitement. Under Civil law systems, provocation, the equivalent of incitement, is regarded as being direct where it is aimed at causing a specific offence to be committed. The prosecution must prove a definite causation between the act characterized as incitement, or provocation in this case, and a specific offence. However, the chamber is of the opinion that the direct element of incitement should be viewed in the light of its cultural and linguistic content. Indeed, a particular speech may be perceived as “direct” in one country, and not so in another, depending on the audience. The chamber further recalls that incitement may be direct, and nonetheless implicit. Thus, at the time the Convention on Genocide was being drafted, the Polish delegate observed that it was sufficient to play skillfully on mob psychology by casting suspicion on certain groups, by insinuating that they were

responsible for economic or other difficulties in order to create an atmosphere favourable to the perpetration of the crime.

The chamber will therefore consider on a case-by-case basis whether, in light of the culture of Rwanda and the specific circumstances of the instant case, acts of incitement can be viewed as direct or not, by focusing mainly on the issue of whether the persons for whom the message was intended immediately grasped the implication thereof.

In light of the foregoing, it can be noted in the final analysis that whatever the legal system, direct and public incitement must be defined for the purposes of interpreting article 2(3)(c), as directly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication.

The *mens rea* required for the crime of direct and public incitement to commit genocide lies in the intent to directly prompt or provoke another to commit genocide. It implies a desire on the part of the perpetrator to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging. That is to say that the person who is inciting to commit genocide must have himself the specific intent to commit genocide, namely, to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

Therefore, the issue before the chamber is whether the crime of direct and public incitement to commit genocide can be punished even where such incitement was unsuccessful. It appears from the *travaux préparatoires* of the Convention on Genocide that the drafters of the Convention considered stating explicitly that incitement to commit genocide could be punished, whether or not it was successful. In the end, a majority decided against such an approach. Nevertheless, the chamber is of the opinion that it cannot thereby be inferred that the intent of the drafters was not to punish unsuccessful acts of incitement. In light of the overall *travaux*, the chamber holds the view that the drafters of the Convention simply decided not to specifically mention that such a form of incitement could be punished.

There are under Common law so-called inchoate offences, which are punishable by virtue of the criminal act alone, irrespective of the result thereof, which may or may not have been achieved. The Civil law counterparts of inchoate offences are known as [*infractions formelles*] (acts constituting an offence *per se* irrespective of their results), as opposed to [*infractions matérielles*] (strict liability offences). Indeed, as is the case with inchoate offenses, in [*infractions formelles*], the method alone is punishable. Put another way, such offenses are “deemed to have been consummated regardless of the result achieved [*unofficial translation*]” contrary to [*infractions matérielles*]. Indeed, Rwandan lawmakers appear to characterize the acts defined under article 91(4) of the Rwandan Penal Code as so-called [*infractions formelles*], since provision is made for their punishment

even where they proved unsuccessful. It should be noted, however, that such offences are the exception, the rule being that in theory, an offence can only be punished in relation to the result envisaged by the lawmakers. In the opinion of the chamber, the fact that such acts are in themselves particularly dangerous because of the high risk they carry for society, even if they fail to produce results, warrants that they be punished as an exceptional measure. The chamber holds that genocide clearly falls within the category of crimes so serious that direct and public incitement to commit such a crime must be punished as such, even where such incitement failed to produce the result expected by the perpetrator.

17. CRIMES AGAINST HUMANITY (ARTICLE 3 OF THE STATUTE)

(a) Crimes against Humanity - Historical development

Crimes against humanity were recognized in the Charter and Judgment of the Nuremberg Tribunal, as well as in Law number 10 of the Control Council for Germany. Article 6(c) of the Charter of Nuremberg Tribunal defines crimes against humanity as:

“... Murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connexion with any crime within the jurisdiction of the chamber, whether or not in violation of the domestic law of the country where perpetrated.”

Article II of Law number 10 of the Control Council Law defined crimes against humanity as:

“Atrocities and Offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population or persecution on political, racial or religious grounds, whether or not in violation of the domestic laws of the country where perpetrated.”

Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character. In fact, the concept of crimes against humanity had been recognised long before Nuremberg. On 28 May 1915, the Governments of France, Great Britain and Russia made a declaration regarding the massacres of the Armenian population in Turkey, denouncing them as “crimes against humanity and civilisation for which all the members of the Turkish government will be held responsible together with its agents implicated in the massacres”. The 1919 Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties formulated by representatives from several States and

presented to the Paris Peace Conference also referred to “offences against ... the laws of humanity”.

These World War I notions derived, in part, from the Martens clause of the Hague Convention (IV) of 1907, which referred to “the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience”. In 1874, George Curtis called slavery a “crime against humanity”. Other such phrases as “crimes against mankind” and “crimes against the human family” appear far earlier in human history (see 12 NYL Sch J Hum Rts 545 (1995)).

The chamber notes that, following the Nuremberg and Tokyo trials, the concept of crimes against humanity underwent a gradual evolution in the *Eichmann*, *Barbie*, *Touvier* and *Papon* cases.

In the *Eichmann* case, the accused, Otto Adolf Eichmann, was charged with offences under Nazi and Nazi Collaborators (punishment) Law, 5710/1950, for his participation in the implementation of the plan known as the Final Solution of the Jewish problem'. Pursuant to section 1(b) of the said law:

“Crime against humanity means any of the following acts: murder, extermination, enslavement, starvation or deportation and other inhumane acts committed against any civilian population, and persecution on national, racial, religious or political grounds.”

The district court in the *Eichmann* stated that crimes against humanity differs from genocide in that for the commission of genocide special intent is required. This special intent is not required for crimes against humanity. Eichmann was convicted by the District court and sentenced to death. Eichmann appealed against his conviction and his appeal was dismissed by the Supreme Court.

In the *Barbie* case, the accused, Klaus Barbie, who was the head of the Gestapo in Lyons from November 1942 to August 1944, during the wartime occupation of France, was convicted in 1987 of crimes against humanity for his role in the deportation and extermination of civilians. Barbie appealed in cassation, but the appeal was dismissed. For the purposes of the present Judgment, what is of interest is the definition of crimes against humanity employed by the Court. The French Court of Cassation, in a Judgment rendered on 20 December 1985, stated:

“Crimes against humanity, within the meaning of article 6(c) of the Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945, which were not subject to statutory limitation of the right of prosecution, even if they were crimes which could also be classified as war crimes within the meaning of article 6(b) of the Charter, were inhumane acts and persecution committed in a systematic manner in the name of a State practising a policy of ideological supremacy, not only against persons by reason of their membership of a racial or religious community, but also against the opponents of that policy, whatever the form of their opposition.”[Emphasis mine]

This was affirmed in a Judgment of the Court of Cassation of 3 June 1988, in which the Court held that:

“The fact that the accused, who had been found guilty of one of the crimes enumerated in article 6(c) of the Charter of the Nuremberg Tribunal, in perpetrating that crime took part in the execution of a common plan to bring about the deportation or extermination of the civilian population during the war, or persecutions on political, racial or religious grounds, constituted not a distinct offence or an aggravating circumstance but rather *an essential element of the crime against humanity, consisting of the fact that the acts charged were performed in a systematic manner in the name of a State practising by those means a policy of ideological supremacy.*”[Emphasis mine]

The definition of crimes against humanity developed in *Barbie* was further developed in the *Touvier* case. In that case, the accused, Paul Touvier, had been a high-ranking officer in the Militia (*Milice*) of Lyons, which operated in “Vichy” France during the German occupation. He was convicted of crimes against humanity for his role in the shooting of seven Jews at Rillieux on 29 June 1994 as a reprisal for the assassination by members of the Resistance, on the previous day, of the Minister for Propaganda of the “Vichy” Government.

The Court of Appeal applied the definition of crimes against humanity used in *Barbie*, stating that:

“The specific intent necessary to establish a crime against humanity was the intention to take part in the execution of a common plan by committing, in a systematic manner, inhuman acts or persecutions in the name of a State practising a policy of ideological supremacy.”

Applying this definition, the Court of Appeal held that Touvier could not be guilty of crimes against humanity since he committed the acts in question in the name of the “Vichy” State, which was not a State practising a policy of ideological supremacy, although it collaborated with Nazi Germany, which clearly did practice such a policy.

The Court of Cassation allowed appeal from the decision of the Court of Appeal, on the grounds that the crimes committed by the accused had been committed at the instigation of a Gestapo officer, and to that extent were linked to Nazi Germany, a State practising a policy of ideological supremacy against persons by virtue of their membership of a racial or religious community. Therefore the crimes could be categorised as crimes against humanity. Touvier was eventually convicted of crimes against humanity by the *Cour d'Assises des Yvelines* on 20 April 1994.

The definition of crimes against humanity used in *Barbie* was later affirmed by the ICTY in its *Vukovar* Rule 61 Decision of 3 April 1996 (IT-95-13-R61), to support its finding that crimes against humanity applied equally where the victims

of the acts were members of a resistance movement as to where the victims were civilians:

“(29) ... Although according to the terms of article 5 of the Statute of this Tribunal combatants in the traditional sense of the term cannot be victims of a crime against humanity, this does not apply to individuals who, at one particular point in time, carried out acts of resistance. As the Commission of Experts, established pursuant to Security Council resolution 780, noted, “it seems obvious that article 5 applies first and foremost to civilians, meaning people who are not combatants. This, however, should not lead to any quick conclusions concerning people who at one particular point in time did bear arms. ... Information of the overall circumstances is relevant for the interpretation of the provision in a spirit consistent with its purpose.” (Doc S/1994/674, paragraph 78).

This conclusion is supported by case law. In the *Barbie* case, the French Cour de Cassation said that:

“Inhumane Acts and persecution which, in the name of a State practising a policy of ideological hegemony, were committed systematically or collectively not only against individuals because of their membership in a racial or religious group but also against the adversaries of that policy whatever the form of the opposition” could be considered a crime against humanity. (Cass Crim 20 December 1985).

Article 7 of the Statute of the International Criminal Court defines a crime against humanity as any of the enumerated acts committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. These enumerated acts are murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this article or any other crime within the jurisdiction of the Court; enforced disappearance of persons; the crime of apartheid; other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or mental or physical health.

18. CRIMES AGAINST HUMANITY IN ARTICLE 3 OF THE STATUTE OF THE TRIBUNAL

The chamber considers that article 3 of the Statute confers on the chamber the jurisdiction to prosecute persons for various inhumane acts which constitute crimes

against humanity. This category of crimes may be broadly broken down into four essential elements, namely:

- (i) the act must be inhumane in nature and character, causing great suffering, or serious injury to body or to mental or physical health;
- (ii) the act must be committed as part of a wide spread or systematic attack;
- (iii) the act must be committed against members of the civilian population;
- (iv) the act must be committed on one or more discriminatory grounds, namely, national, political, ethnic, racial or religious grounds.

19. THE ACT MUST BE COMMITTED AS PART OF A WIDE SPREAD OR SYSTEMATIC ATTACK

The chamber considers that it is a prerequisite that the act must be committed as part of a wide spread or systematic attack and not just a random act of violence. The act can be part of a widespread or systematic attack and need not be a part of both.

The concept of 'widespread' may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims. The concept of 'systematic' may be defined as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources. There is no requirement that this policy must be adopted formally as the policy of a state. There must however be some kind of preconceived plan or policy.

The concept of 'attack' may be defined as a unlawful act of the kind enumerated in article 3(a) to (i) of the Statute, like murder, extermination, enslavement etc. An attack may also be non violent in nature, like imposing a system of apartheid, which is declared a crime against humanity in article 1 of the Apartheid Convention of 1973, or exerting pressure on the population to act in a particular manner, may come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner.

20. THE ACT MUST BE DIRECTED AGAINST THE CIVILIAN POPULATION

The chamber considers that an act must be directed against the civilian population if it is to constitute a crime against humanity. Members of the civilian population are people who are not taking any active part in the hostilities, including members of the armed forces who laid down their arms and those persons placed *hors de combat* by sickness, wounds, detention or any other cause. Where there are certain

individuals within the civilian population who do not come within the definition of civilians, this does not deprive the population of its civilian character.

21. THE ACT MUST BE COMMITTED ON DISCRIMINATORY GROUNDS

The Statute stipulates that inhumane acts committed against the civilian population must be committed on national, political, ethnic, racial or religious grounds.' Discrimination on the basis of a person's political ideology satisfies the requirement of political' grounds as envisaged in article 3 of the Statute. For definitions on national, ethnic, racial or religious grounds see *supra*.

Inhumane acts committed against persons not falling within any one of the discriminatory categories could constitute crimes against humanity if the perpetrator's intention was to further his attacks on the group discriminated against on one of the grounds mentioned in article 3 of the Statute. The perpetrator must have the requisite intent for the commission of crimes against humanity.

22. THE ENUMERATED ACTS

Article 3 of the Statute sets out various acts that constitute crimes against humanity, namely: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecution on political, racial and religious grounds; and; other inhumane acts. Although the category of acts that constitute crimes against humanity are set out in article 3, this category is not exhaustive. Any act which is inhumane in nature and character may constitute a crime against humanity, provided the other elements are met. This is evident in (i) which caters for all other inhumane acts not stipulated in (a) to (h) of article 3.

The chamber notes that the accused is indicted for murder, extermination, torture, rape and other acts that constitute inhumane acts. The chamber in interpreting article 3 of the Statute, shall focus its discussion on these acts only.

23. MURDER

The chamber considers that murder is a crime against humanity, pursuant to article 3(a) of the Statute. The International Law Commission discussed the Inhumane Act of Murder in the context of the definition of crimes against humanity and concluded that the crime of murder is clearly understood and defined in the national law of every state and therefore there is no need to further explain this prohibited act.

The chamber notes that article 3(a) of the English version of the Statute refers to “Murder”, whilst the French version of the Statute refers to “Assassinat”. Customary International Law dictates that it is the act of “Murder” that constitutes a crime against humanity and not “Assassinat”. There are therefore sufficient reasons to assume that the French version of the Statute suffers from an error in translation.

The chamber defines murder as the unlawful, intentional killing of a human being. The requisite elements of murder are:

- (a) the victim is dead;
- (b) the death resulted from an unlawful act or omission of the accused or a subordinate;
- (c) at the time of the killing the accused or a subordinate had the intention to kill or inflict grievous bodily harm on the deceased having known that such bodily harm is likely to cause the victim's death, and is reckless whether death ensues or not.

Murder must be committed as part of a widespread or systematic attack against a civilian population. The victim must be a member of this civilian population. The victim must have been murdered because he was discriminated against on national, ethnic, racial, political or religious grounds.

24. EXTERMINATION

The chamber considers that extermination is a crime against humanity, pursuant to article 3(c) of the Statute. Extermination is a crime which by its very nature is directed against a group of individuals. Extermination differs from murder in that it requires an element of mass destruction which is not required for murder.

The chamber defines the essential elements of extermination as the following:

- (a) the accused or his subordinate participated in the killing of certain named or described persons;
- (b) the act or omission was unlawful and intentional.
- (c) the unlawful act or omission must be part of a widespread or systematic attack;
- (d) the attack must be against the civilian population;
- (e) the attack must be on discriminatory grounds, namely: national, political, ethnic, racial, or religious grounds.

25. TORTURE

The chamber considers that torture is a crime against humanity pursuant to article 3(f) of the Statute. Torture may be defined as:

“...any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

The chamber defines the essential elements of torture as:

- (i) The perpetrator must intentionally inflict severe physical or mental pain or suffering upon the victim for one or more of the following purposes:
 - (a) to obtain information or a confession from the victim or a third person;
 - (b) to punish the victim or a third person for an act committed or suspected of having been committed by either of them;
 - (c) for the purpose of intimidating or coercing the victim or the third person;
 - (d) for any reason based on discrimination of any kind.
- (ii) The perpetrator was himself an official, or acted at the instigation of, or with the consent or acquiescence of, an official or person acting in an official capacity.

(The chamber finds that torture is a crime against humanity if the following further elements are satisfied:

- (a) Torture must be perpetrated as part of a widespread or systematic attack;
- (b) the attack must be against the civilian population;
- (c) the attack must be launched on discriminatory grounds, namely: national, ethnic, racial, religious and political grounds.

26. RAPE

Considering the extent to which rape constitute crimes against humanity, pursuant to article 3(g) of the Statute, the chamber must define rape, as there is no commonly accepted definition of this term in international law. While rape has been defined in certain national jurisdictions as non-consensual intercourse, variations on the act of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual.

The chamber considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition of torture, focusing rather on the conceptual frame work of state

sanctioned violence. This approach is more useful in international law. Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

The chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive. This act must be committed:

- (a) as part of a wide spread or systematic attack;
- (b) on a civilian population;
- (c) on certain catalogued discriminatory grounds, namely: national, ethnic, political, racial, or religious grounds.

27. VIOLATIONS OF COMMON ARTICLE 3 AND ADDITIONAL PROTOCOL II (ARTICLE 4 OF THE STATUTE)

(a) Article 4 of the Statute

Pursuant to article 4 of the Statute, the chamber shall have the power to prosecute persons committing or ordering to be committed serious violations of article 3 common to the four Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

- (a) violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
- (b) collective punishments;
- (c) taking of hostages;
- (d) acts of terrorism;
- (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
- (f) pillage;
- (g) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples;
- (h) Threats to commit any of the foregoing acts.

Prior to developing the elements for the above cited offences contained within article 4 of the Statute, the chamber deems it necessary to comment upon the applicability of common article 3 and Additional Protocol II as regards the situation which existed in Rwanda in 1994 at the time of the events contained in the Indictment.

(b) Applicability of Common article 3 and Additional Protocol II

The four 1949 Geneva Conventions and the 1977 Additional Protocol I thereto generally apply to international armed conflicts only, whereas article 3 common to the Geneva Conventions extends a minimum threshold of humanitarian protection as well to all persons affected by a non-international conflict, a protection which was further developed and enhanced in the 1977 Additional Protocol II. In the field of international humanitarian law, a clear distinction as to the thresholds of application has been made between situations of international armed conflicts, in which the law of armed conflicts is applicable as a whole, situations of non-international (internal) armed conflicts, where Common article 3 and Additional Protocol II are applicable, and non-international armed conflicts where only Common article 3 is applicable. Situations of internal disturbances are not covered by international humanitarian law.

The distinction pertaining to situations of conflicts of a non-international character emanates from the differing intensity of the conflicts. Such distinction is inherent to the conditions of applicability specified for Common article 3 or Additional Protocol II respectively. Common article 3 applies to “armed conflicts not of an international character”, whereas for a conflict to fall within the ambit of Additional Protocol II, it must “take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”. Additional Protocol II does not in itself establish a criterion for a non-international conflict, rather it merely develops and supplements the rules contained in Common article 3 without modifying its conditions of application.

It should be stressed that the ascertainment of the intensity of a non-international conflict does not depend on the subjective judgment of the parties to the conflict. It should be recalled that the four Geneva Conventions, as well as the two Protocols, were adopted primarily to protect the victims, as well as potential victims, of armed conflicts. If the application of international humanitarian law depended solely on the discretionary judgment of the parties to the conflict, in most cases there would be a tendency for the conflict to be minimized by the parties thereto. Thus, on the basis of objective criteria, both Common article 3 and

Additional Protocol II will apply once it has been established there exists an internal armed conflict which fulfills their respective pre-determined criteria.

The Security Council, when delimiting the subject-matter jurisdiction of the ICTR, incorporated violations of international humanitarian law which may be committed in the context of both an international and an internal armed conflict:

“Given the nature of the conflict as non-international in character, the Council has incorporated within the subject-matter jurisdiction of the Tribunal violations of international humanitarian law which may either be committed in both international and internal armed conflicts, such as the crime of genocide and crimes against humanity, or may be committed only in internal armed conflicts, such as violations of article 3 common to the four Geneva Conventions, as more fully elaborated in article 4 of Additional Protocol II.

In that latter respect, the Security Council has elected to take a more expansive approach to the choice of the applicable law than the one underlying the Statute of the Yugoslav Tribunal, and included within the subject-matter jurisdiction of the Rwanda Tribunal international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime. Article 4 of the Statute, accordingly, includes violations of Additional Protocol II, which, as a whole, has not yet been universally recognized as part of customary international law, for the first time criminalizes common article 3 of the four Geneva Conventions.

Although the Security Council elected to take a more expansive approach to the choice of the subject-matter jurisdiction of the Tribunal than that of the ICTY, by incorporating international instruments regardless of whether they were considered part of customary international law or whether they customarily entailed the individual criminal responsibility of the perpetrator of the crime, the chamber believes, an essential question which should be addressed at this stage is whether article 4 of the Statute includes norms which did not, at the time the crimes alleged in the Indictment were committed, form part of existing international customary law. Moreover, the chamber recalls the establishment of the ICTY, during which the UN Secretary General asserted that in application of the principle of *nullum crimen sine lege* the International Tribunal should apply rules of International Humanitarian law which are *beyond any doubt part of* customary law. [Emphasis mine]

Notwithstanding the above, a possible approach would be for the chamber not to look at the nature of the building blocks of article 4 of the Statute nor for it to categorize the conflict as such but, rather, to look only at the relevant parts of Common article 3 and Additional Protocol II in the context of this trial. Indeed, the Security Council has itself never explicitly determined how an armed conflict should be characterised. Yet it would appear that, in the case of the ICTY, the Security Council, by making reference to the four Geneva Conventions, considered that the conflict in the former Yugoslavia was an international armed conflict, although it did not suggest the criteria by which it reached this finding. Similarly, when the Security Council added Additional Protocol II to the subject

matter jurisdiction of the ICTR, this could suggest that the Security Council deemed the conflict in Rwanda as an Additional Protocol II conflict. Thus, it would not be necessary for the chamber to determine the precise nature of the conflict, this having already been pre-determined by the Security Council. Article 4 of the Statute would be applicable irrespective of the Additional Protocol II question', so long as the conflict were covered, at the very least, by the customary norms of Common article 3. Findings would thus be made on the basis of whether or not it were proved beyond a reasonable doubt that there has been a serious violation in the form of one or more of the acts enumerated in article 4 of the Statute.

However, the chamber recalls the way in which the Prosecutor has brought some of the counts against the accused, namely counts six, eight, ten, twelve and fifteen. For the first four of these, there is mention only of Common article 3 as the subject matter jurisdiction of the particular alleged offences, whereas count fifteen makes an additional reference to Additional Protocol II. To so add Additional Protocol II should not, in the opinion of the chamber, be dealt with as a mere expansive enunciation of a *ratione materiae* which has been pre-determined by the Security Council. Rather, the chamber finds it necessary and reasonable to establish the applicability of both Common article 3 and Additional Protocol II individually. Thus, if an offence, as per count 15, is charged under both Common article 3 and Additional Protocol II, it will not suffice to apply Common article 3 and take for granted that article 4 of the Statute, hence Additional Protocol II, is therefore automatically applicable.

It is today clear that the norms of Common article 3 have acquired the status of customary law in that most States, by their domestic penal codes, have criminalized acts which if committed during internal armed conflict, would constitute violations of Common article 3. It was also held by the ICTY Trial chamber in the Tadic judgment that article 3 of the ICTY Statute (Customs of War), being the body of customary international humanitarian law not covered by articles 2, 4, and 5 of the ICTY Statute, included the regime of protection established under Common article 3 applicable to armed conflicts not of an international character. This was in line with the view of the ICTY Appeals chamber stipulating that Common article 3 beyond doubt formed part of customary international law, and further that there exists a corpus of general principles and norms on internal armed conflict embracing Common article 3 but having a much greater scope.

However, as aforesaid, Additional Protocol II as a whole was not deemed by the Secretary-General to have been universally recognized as part of customary international law. The Appeals chamber concurred with this view inasmuch as "[m]any provisions of this Protocol [II] can now be regarded as declaratory of existing rules or as having crystallised in emerging rules of customary law[]", but not all.

Whilst the chamber is very much of the same view as pertains to Additional Protocol II as a whole, it should be recalled that the relevant article in the context of the ICTR is article 4(2) (Fundamental Guarantees) of Additional Protocol II. All of the guarantees, as enumerated in article 4 reaffirm and supplement Common article 3 and, as discussed above, Common article 3 being customary in nature, the chamber is of the opinion that these guarantees did also at the time of the events alleged in the Indictment form part of existing international customary law.

(c) Individual Criminal Responsibility

For the purposes of an international criminal Tribunal which is trying individuals, it is not sufficient merely to affirm that Common article 3 and parts of article 4 of Additional Protocol II – which comprise the subject-matter jurisdiction of article 4 of the Statute – form part of international customary law. Even if article 6 of the Statute provides for individual criminal responsibility as pertains to articles 2, 3 and 4 of the Statute, it must also be shown that an individual committing serious violations of these customary norms incurs, as a matter of custom, individual criminal responsibility thereby. Otherwise, it might be argued that these instruments only state norms applicable to States and Parties to a conflict, and that they do not create crimes for which individuals may be tried.

As regards individual criminal responsibility for serious violations of Common article 3, the ICTY has already affirmed this principle in the Tadic case. In the ICTY Appeals chamber, the problem was posed thus:

“Even if customary international law includes certain basic principles applicable to both internal and international armed conflicts, appellant argues that such provisions do not entail individual criminal responsibility when breaches are committed in internal armed conflicts; these provisions cannot, therefore, fall within the scope of the International Tribunal's jurisdiction.”

Basing itself on rulings of the Nuremberg Tribunal, on “elements of international practice which show that States intend to criminalise serious breaches of customary rules and principles on internal conflicts”, as well as on national legislation designed to implement the Geneva Conventions, the ICTY Appeals chamber reached the conclusion:

“All of these factors confirm that customary international law imposes criminal liability for serious violations of common article 3, as supplemented by other general principles and rules on protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.”

This was affirmed by the ICTY Trial chamber when it rendered in the Tadic judgment.

The chamber considers this finding of the ICTY Appeals chamber convincing and dispositive of the issue, both with respect to serious violations of Common article 3 and of Additional Protocol II.

It should be noted, moreover, that article 4 of the ICTR Statute states that:

“The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed *serious violations* of article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977” [Emphasis mine].

The chamber understands the phrase “serious violation” to mean “a breach of a rule protecting important values [which] must involve grave consequences for the victim”, in line with the above-mentioned Appeals chamber Decision in *Tadić*, paragraph 94. The list of serious violations which is provided in article 4 of the Statute is taken from Common article 3 which contains fundamental prohibitions as a humanitarian minimum of protection for war victims – and article 4 of Additional Protocol II, which equally outlines “Fundamental Guarantees”. The list in article 4 of the Statute thus comprises *serious* violations of the fundamental humanitarian guarantees which, as has been stated above, are recognized as part of international customary law. In the opinion of the chamber, it is clear that the authors of such egregious violations must incur individual criminal responsibility for their deeds.

The chamber, therefore, concludes the violation of these norms entails, as a matter of customary international law, individual responsibility for the perpetrator. In addition to this argument from custom, there is the fact that the Geneva Conventions of 1949 (and thus Common article 3) were ratified by Rwanda on 5 May 1964 and Additional Protocol II on 19 November 1984, and were therefore in force on the territory of Rwanda at the time of the alleged offences. Moreover, all the offences enumerated under article 4 of the Statute constituted crimes under Rwandan law in 1994. Rwandan nationals were therefore aware, or should have been aware, in 1994 that they were amenable to the jurisdiction of Rwandan courts in case of commission of those offences falling under article 4 of the Statute.

(d) The nature of the conflict

As aforesaid, it will not suffice to establish that as the criteria of Common article 3 have been met, the whole of article 4 of the Statute, hence Additional Protocol II, will be applicable. Where alleged offences are charged under both Common article 3 and Additional Protocol II, which has a higher threshold, the Prosecutor will need to prove that the criteria of applicability of, on the one hand, Common article 3 and, on the other, Additional Protocol II have been met. This is so because Additional Protocol II is a legal instrument the overall sole purpose of which is to afford protection to victims in conflicts not of an international character. Hence,

the chamber deems it reasonable and necessary that, prior to deciding if there have been serious violations of the provisions of article 4 of the Statute, where a specific reference has been made to Additional Protocol II in counts against an accused, it must be shown that the conflict is such as to satisfy the requirements of Additional Protocol II.

(e) Common article 3

The norms set by Common article 3 apply to a conflict as soon as it is an armed conflict not of an international character'. An inherent question follows such a description, namely, what constitutes an armed conflict? The Appeals chamber in the Tadic decision on Jurisdiction held "that an armed conflict exists whenever there is ... protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until ... in the case of internal conflicts, a peaceful settlement is reached". Similarly, the chamber notes that the ICRC commentary on Common article 3 suggests useful criteria resulting from the various amendments discussed during the Diplomatic Conference of Geneva, 1949, *inter alia*:

That the Party in revolt against the *de jure* Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring the respect for the Convention.

That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military in possession of a part of the national territory.

- (a) That the *de jure* Government has recognized the insurgents as belligerents; or
- (b) That it has claimed for itself the rights of a belligerent; or
- (c) That it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or
- (d) That the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of peace, or an act of aggression.

The above reference criteria were enunciated as a means of distinguishing genuine armed conflicts from mere acts of banditry or unorganized and short-lived insurrections. The term, armed conflict' in itself suggests the existence of hostilities between armed forces organized to a greater or lesser extent. This consequently rules out situations of internal disturbances and tensions. For a finding to be made on the existence of an internal armed conflict in the territory of Rwanda at the time of the events alleged, it will therefore be necessary to evaluate both the intensity and organization of the parties to the conflict.

Evidence presented in relation to paragraphs 5-11 of the Indictment, namely the testimony of Major-General Dallaire, has shown there to have been a civil war between two groups, being on the one side, the governmental forces, the FAR, and on the other side, the RPF. Both groups were well-organized and considered to be armies in their own right. Further, as pertains to the intensity of conflict, all observers to the events, including UNAMIR and UN Special rapporteurs, were unanimous in characterizing the confrontation between the two forces as a war, an internal armed conflict. Based on the foregoing, the chamber finds there existed at the time of the events alleged in the Indictment an armed conflict not of an international character as covered by Common article 3 of the 1949 Geneva Conventions.

(f) Additional Protocol II

As stated above, Additional Protocol II applies to conflicts which “take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”.

Thus, the conditions to be met to fulfil the material requirements of applicability of Additional Protocol II at the time of the events alleged in the Indictment would entail showing that:

- (a) an armed conflict took place in the territory of a High Contracting Party, namely Rwanda, between its armed forces and dissident armed forces or other organized armed groups;
- (b) the dissident armed forces or other organized armed groups were under responsible command;
- (c) the dissident armed forces or other organized armed groups were able to exercise such control over a part of their territory as to enable them to carry out sustained and concerted military operations; and
- (d) the dissident armed forces or other organized armed groups were able to implement Additional Protocol II.

As per Common article 3, these criteria have to be applied objectively, irrespective of the subjective conclusions of the parties involved in the conflict. A number of precisions need to be made about the said criteria prior to the chamber making a finding thereon.

The concept of armed conflict has already been discussed in the previous section pertaining to Common article 3. It suffices to recall that an armed conflict is distinguished from internal disturbances by the level of intensity of the conflict and the degree of organization of the parties to the conflict. Under Additional Protocol II, the parties to the conflict will usually either be the government confronting

dissident armed forces, or the government fighting insurgent organized armed groups. The term, armed forces' of the High Contracting Party is to be defined broadly, so as to cover all armed forces as described within national legislations.

The armed forces opposing the government must be under responsible command, which entails a degree of organization within the armed group or dissident armed forces. This degree of organization should be such so as to enable the armed group or dissident forces to plan and carry out concerted military operations, and to impose discipline in the name of a *de facto* authority. Further, these armed forces must be able to dominate a sufficient part of the territory so as to maintain sustained and concerted military operations and to apply Additional Protocol II. In essence, the operations must be continuous and planned. The territory in their control is usually that which has eluded the control of the government forces.

In the present case, evidence has been presented to the chamber, which showed there was at the least a conflict not of a international character in Rwanda at the time of the events alleged in the Indictment. The chamber, also taking judicial notice of a number of UN official documents dealing with the conflict in Rwanda in 1994, finds, in addition to the requirements of Common article 3 being met, that the material conditions listed above relevant to Additional Protocol II have been fulfilled. It has been shown that there was a conflict between, on the one hand, the RPF, under the command of General Kagame, and, on the other, the governmental forces, the FAR. The RPF increased its control over the Rwandan territory from that agreed in the Arusha Accords to over half of the country by mid - May 1994, and carried out continuous and sustained military operations until the cease fire on 18 July 1994 which brought the war to an end. The RPF troops were disciplined and possessed a structured leadership which was answerable to authority. The RPF had also stated to the International Committee of the Red Cross that it was bound by the rules of International Humanitarian law. The chamber finds the said conflict to have been an internal armed conflict within the meaning of Additional Protocol II. Further, the chamber finds that conflict took place at the time of the events alleged in the Indictment.

(g) *Ratione personae*

Two distinct issues arise with respect to personal jurisdiction over serious violations of Common article 3 and Additional Protocol II - the class of victims and the class of perpetrators.

(h) The class of victims

Paragraph 10 of the Indictment reads, "The victims referred to in this Indictment were, at all relevant times, persons not taking an active part in the hostilities". This is a material averment for charges involving article 4 in as much as Common article

3 is for the protection of “persons taking no active part in the hostilities” (Common article 3(1)), and article 4 of Additional Protocol II is for the protection of, “all persons who do not take a direct part or who have ceased to take part in hostilities”. These phrases are so similar that, for the chamber's purposes, they may be treated as synonymous. Whether the victims referred to in the Indictment are *indeed* persons not taking an active part in the hostilities is a factual question, which has been considered in the Factual Findings on the General Allegations (paragraphs 5-11 of the Indictment).

(i) The class of perpetrators

The four Geneva Conventions – as well as the two Additional Protocols – as stated above, were adopted primarily to protect the victims as well as potential victims of armed conflicts. This implies thus that the legal instruments are primarily addressed to persons who by virtue of their authority, are responsible for the outbreak of, or are otherwise engaged in the conduct of hostilities. The category of persons to be held accountable in this respect then, would in most cases be limited to commanders, combatants and other members of the armed forces.

Due to the overall protective and humanitarian purpose of these international legal instruments, however, the delimitation of this category of persons bound by the provisions in Common article 3 and Additional Protocol II should not be too restricted. The duties and responsibilities of the Geneva Conventions and the Additional Protocols, hence, will normally apply only to individuals of all ranks belonging to the armed forces under the military command of either of the belligerent parties, or to individuals who were legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or *de facto* representing the Government, to support or fulfil the war efforts. The objective of this approach, thus, would be to apply the provisions of the Statute in a fashion which corresponds best with the underlying protective purpose of the Conventions and the Protocols.

However, the Indictment does not specifically aver that the accused falls in the class of persons who may be held responsible for serious violations of Common article 3 and Additional Protocol II. It has not been alleged that the accused was officially a member of the Rwandan armed forces' (in its broadest sense). It could, hence, be objected that, as a civilian, article 4 of the Statute, which concerns the law of armed conflict, does not apply to him.

It is, in fact, well-established, at least since the Tokyo trials, that civilians may be held responsible for violations of international humanitarian law. Hirota, the former Foreign Minister of Japan, was convicted at Tokyo for crimes committed during the rape of Nanking. Other post-World War II trials unequivocally support the imposition of individual criminal liability for war crimes on civilians where

they have a link or connection with a Party to the conflict. The principle of holding civilians liable for breaches of the laws of war is, moreover, favored by a consideration of the humanitarian object and purpose of the Geneva Conventions and the Additional Protocols, which is to protect war victims from atrocities.

Thus it is clear from the above that the laws of war must apply equally to civilians as to combatants in the conventional sense. Further, the chamber notes, in light of the above dicta, that the accused was not, at the time of the events in question, a mere civilian but a bourgmestre. The chamber therefore concludes that, if so established factually, the accused could fall in the class of individuals who may be held responsible for serious violations of international humanitarian law, in particular serious violations of Common article 3 and Additional Protocol II.

(j) *Ratione loci*

There is no clear provision on applicability *ratione loci* either in Common article 3 or Additional Protocol II. However, in this respect Additional Protocol II seems slightly clearer, in so far as it provides that the Protocol shall be applied “to all persons affected by an armed conflict as defined in article 1”. The commentary thereon specifies that this applicability is irrespective of the exact location of the affected person in the territory of the State engaged in the conflict. The question of applicability *ratione loci* in non-international armed conflicts, when only Common article 3 is of relevance should be approached the same way, i.e. the article must be applied in the whole territory of the State engaged in the conflict. This approach was followed by the Appeals chamber in its decision on jurisdiction in Tadic, wherein it was held that “the rules contained in [common] article 3 also apply outside the narrow geographical context of the actual theatre of combat operations”.

Thus the mere fact that Rwanda was engaged in an armed conflict meeting the threshold requirements of Common article 3 and Additional Protocol II means that these instruments would apply over the whole territory hence encompassing massacres which occurred away from the war front'. From this follows that it is not possible to apply rules in one part of the country (i.e. Common article 3) and other rules in other parts of the country (i.e. Common article 3 and Additional Protocol II). The aforesaid, however, is subject to the caveat that the crimes must not be committed by the perpetrator for purely personal motives.

(k) Conclusion

The applicability of Common article 3 and Additional Protocol II has been dealt with above and findings made thereon in the context of the temporal setting of events alleged in the Indictment. It remains for the chamber to make its findings with regard the accused's culpability under article 4 of the Statute. This will be dealt with in section 7 of the judgment.

28. LEGAL FINDINGS

(a) Counts six, eight, ten and twelve - Violations of Common article 3 (murder and cruel treatment) and Count fifteen - Violations of Common article 3 and Additional Protocol II (outrages upon personal dignity, in particular rape...)

Counts 6, 8, 10, and 12 of the Indictment charge Akayesu with Violations of Common article 3 of the 1949 Geneva Conventions, and Count 15 charges Akayesu of Violations of Common article 3 of the 1949 Geneva Conventions and the 1977 Additional Protocol II thereto. All these counts are covered by article 4 of the Statute.

It has already been proved beyond reasonable doubt that there was an armed conflict not of an international character between the Government of Rwanda and the RPF in 1994 at the time of the events alleged in the Indictment. The chamber found the conflict to meet the requirements of Common article 3 as well as Additional Protocol II.

For Akayesu to be held criminally responsible under article 4 of the Statute, it is incumbent on the Prosecutor to prove beyond a reasonable doubt that Akayesu acted for either the Government or the RPF in the execution of their respective conflict objectives. As stipulated earlier in this judgment, this implies that Akayesu would incur individual criminal responsibility for his acts if it were proved that by virtue of his authority, he is either responsible for the outbreak of, or is otherwise directly engaged in the conduct of hostilities. Hence, the Prosecutor will have to demonstrate to the chamber and prove that Akayesu was either a member of the armed forces under the military command of either of the belligerent parties, or that he was legitimately mandated and expected, as a public official or agent or person otherwise holding public authority or *de facto* representing the Government, to support or fulfil the war efforts. Indeed, the chamber recalls that article 4 of the Statute also applies to civilians.

Evidence presented during trial established that, at the time of the events alleged in the Indictment, Akayesu wore a military jacket, carried a rifle, he assisted the military on their arrival in Taba by undertaking a number of tasks, including reconnaissance and mapping of the commune, and the setting up of radio communications, and he allowed the military to use his office premises. The Prosecutor relied in part on these facts to demonstrate that there was a nexus between the actions of Akayesu and the conflict. Further, the Prosecutor argued that reference by Akayesu to individuals as RPF accomplices was indicative of Akayesu connecting his actions to the conflict between the Government and the RPF.

It has been established in this judgment that Akayesu embodied the communal authority and that he held an executive civilian position in the territorial administrative subdivision of Commune. However, the Prosecutor did not bring sufficient evidence to show how and in what capacity Akayesu was supporting the Government effort against the RPF. The evidence as pertains to the wearing of a military jacket and the carrying of a rifle, in the opinion of the chamber, are not significant in demonstrating that Akayesu actively supported the war effort. Furthermore, the chamber finds that the limited assistance given to the military by the accused in his role as the head of the commune does not suffice to establish that he actively supported the war effort. Moreover, the chamber recalls it has been proved that references to RPF accomplices in the context of the events which occurred in Taba were to be understood as meaning Tutsi.

Considering the above, and based on all the evidence presented in this case, the chamber finds that it has not been proved beyond reasonable doubt that the acts perpetrated by Akayesu in the commune of Taba at the time of the events alleged in the Indictment were committed in conjunction with the armed conflict. The chamber further finds that it has not been proved beyond reasonable doubt that Akayesu was a member of the armed forces, or that he was legitimately mandated and expected, as a public official or agent or person otherwise holding public authority or *de facto* representing the Government, to support or fulfil the war efforts.

The Tribunal therefore finds that Jean-Paul Akayesu did not incur individual criminal responsibility under counts six, eight, ten, twelve and fifteen of the Indictment.

(b) Count five - Crimes against humanity (murder)

Count five of the indictment charges the accused with a crime against humanity (murder), pursuant to article 3(a) of the Statute, for the acts alleged in paragraphs 15 and 18 of the indictment.

The definition of crimes against humanity, including the various elements that comprise the enumerated offences under article 3 of the Statute have already been discussed.

The chamber finds beyond a reasonable doubt that the accused was present and addressed a gathering in Gishyeshye sector on the morning of 19 April 1994. The chamber however finds that it has not been proven beyond a reasonable doubt that the accused during this address, mentioned the names of Juvénal Rukundakuvuga or Emmanuel Sempabwa as Tutsi to be killed and as a result thereof they were subsequently killed.

The chamber finds beyond a reasonable doubt that during his search for Ephrem Karangwa, the accused participated in the killing of Simon Mutijima, Thaddée Uwanyiligira and Jean Chrysostome, by ordering their deaths and being present when they were killed.

The chamber finds beyond a reasonable doubt that Simon Mutijima, Thaddée Uwanyiligira and Jean Chrysostome were civilians, taking no active part in the hostilities that prevailed in Rwanda in 1994 and the only reason they were killed is because they were Tutsi.

The chamber finds beyond a reasonable doubt that in ordering the killing of Simon Mutijima, Thaddée Uwanyiligira and Jean Chrysostome, the accused had the requisite intent to kill them as part of a widespread or systematic attack against the civilian population of Rwanda on ethnic grounds.

The chamber finds beyond a reasonable doubt that in ordering the killing of Simon Mutijima, Thaddée Uwanyiligira and Jean Chrysostome, the accused is individually criminally responsible for the death of these victims, pursuant to article 6(1) of the Statute.

The chamber finds beyond a reasonable doubt that there was a widespread and systematic attack against the civilian population in Rwanda on 19 April 1994 and the conduct of the accused formed part of this attack.

The chamber finds beyond a reasonable doubt that the killing of Simon Mutijima, Thaddée Uwanyiligira and Jean Chrysostome constitutes murder committed, as part of a widespread or systematic attack on the civilian population on ethnic grounds and as such constitutes a crime against humanity. Accordingly, the chamber finds beyond a reasonable doubt that the accused is guilty as charged in count five of the indictment.

(c) Count seven - Crimes against Humanity (murder)

Count seven of the indictment charges the accused with a crime against humanity (murder), pursuant to article 3(a) of the Statute, for the acts alleged in paragraph 19 of the indictment.

The definition of crimes against humanity, including the various elements that comprise the enumerated offences under article 3 of the Statute have already been discussed.

The chamber finds beyond a reasonable doubt that on 19 April 1994, the accused took eight detained refugees who were civilians and who did not take any active part in the hostilities that prevailed in Rwanda in 1994 and handed them over to the local militia, known as the Interahamwe with orders that they be killed.

The chamber finds beyond a reasonable doubt that the Interahamwe, acting on the orders from the accused killed these eight refugees, at the bureau communal in the presence of the accused.

The chamber finds beyond a reasonable doubt that in ordering the killing of the eight refugees, the accused had the requisite intent to kill them as part of a

widespread or systematic attack against the civilian population of Rwanda on ethnic grounds and as such he is criminally responsible for the killing of these eight refugees.

The chamber finds beyond a reasonable doubt that in ordering the killing of the eight refugees, the accused is individually criminally responsible for the death of these victims, pursuant to article 6(1) of the Statute.

The chamber finds beyond a reasonable doubt that there was a widespread and systematic attack against the civilian population in Rwanda on 19 April 1994 and the conduct of the accused formed part of this attack.

The chamber finds beyond a reasonable doubt that the killing of these eight refugees constitutes murder committed, as part of a widespread or systematic attack on the civilian population on ethnic grounds and as such constitutes a crime against humanity. Accordingly, the chamber finds beyond a reasonable doubt that the accused is guilty as charged in count seven of the indictment.

(d) Count nine - Crimes against Humanity (murder)

Count nine of the indictment charges the accused with a crime against humanity (murder), pursuant to article 3(a) of the Statute, for the acts alleged in paragraph 20 of the indictment.

The definition of crimes against humanity, including the various elements that comprise the enumerated offences under article 3 of the Statute have already been discussed.

The chamber finds beyond a reasonable doubt that on 19 April 1994, the accused ordered the local people and militia known as the Interahamwe to kill intellectual people.

The chamber finds beyond a reasonable doubt that the Interahamwe and the local population, acting on the orders of the accused killed five teachers namely; a professor known as Samuel; Tharcisse who was killed in the presence of the accused; Theogene, Phoebe Uwizeze and her fiancé.

The chamber finds beyond a reasonable doubt that these five teachers were civilians and did not take any active part in the hostilities that prevailed in Rwanda in 1994.

The chamber finds beyond a reasonable doubt that these five teachers were killed because they were Tutsi.

The chamber finds beyond a reasonable doubt that in ordering the killing of these five teachers, the accused had the requisite intent to kill them as part of a widespread or systematic attack against the civilian population of Rwanda on ethnic grounds.

The chamber finds beyond a reasonable doubt that in ordering the killing of these five teachers, the accused is individually criminally responsible for the death of these victims, pursuant to article 6(1) of the Statute.

The chamber finds beyond a reasonable doubt that there was a widespread and systematic attack against the civilian population in Rwanda on 19 April 1994 and the conduct of the accused formed part of this attack.

The chamber finds, beyond a reasonable doubt that the killing of these five people constitute murder committed, as part of a widespread or systematic attack on the civilian population on ethnic grounds and as such constitutes a crime against humanity. Accordingly, the chamber finds beyond a reasonable doubt that the accused is guilty as charged in count nine of the indictment.

(e) Count 4 – Direct and Public Incitement to commit Genocide

Count 4 deals with the allegations described in paragraphs 14 and 15 of the Indictment, relating, essentially, to the speeches that Akayesu reportedly made at a meeting held in Gishyeshye on 19 April 1994. The Prosecutor alleges that, through his speeches, Akayesu committed the crime of direct and public incitement to commit genocide, a crime punishable under article 2(3)(c) of the Statute.

The Trial chamber made the following factual findings on the events described in paragraphs 14 and 15 of the Indictment. The chamber is satisfied beyond a reasonable doubt that:

- (a) Akayesu, in the early hours of 19 April 1994, joined a crowd of over 100 people, which had gathered around the body of a young member of the Interahamwe in Gishyeshye.
- (b) He seized that opportunity to address the people and, owing, particularly, to his functions as bourgmestre and his authority over the population, he led the gathering and the proceedings.
- (c) It has been established that Akayesu then clearly urged the population to unite in order to eliminate what he termed the sole enemy: the accomplices of the Inkotanyi.
- (d) On the basis of consistent testimonies heard throughout the proceedings and the evidence of Dr Ruzindana, appearing as expert witness on linguistic matters, the chamber is satisfied beyond a reasonable doubt that the population understood Akayesu's call as one to kill the Tutsi. Akayesu himself was fully aware of the impact of his speech on the crowd and of the fact that his call to fight against the accomplices of the Inkotanyi would be construed as a call to kill the Tutsi in general.

- (e) During the said meeting, Akayesu received from the Interahamwe documents which included lists of names, and read from the lists to the crowd by stating, in particular, that the names were those of RPF accomplices.
- (f) Akayesu testified that the lists contained, especially, the name of Ephrem Karangwa, whom he named specifically, while being fully aware of the consequences of doing so. Indeed, he admitted before the chamber that, at the time of the events alleged in the Indictment, to label anyone in public as an accomplice of the RPF would put such a person in danger.
- (g) The chamber is of the opinion that there is a causal relationship between Akayesu's speeches at the gathering of 19 April 1994 and the ensuing widespread massacres of Tutsi in Taba.

From the foregoing, the chamber is satisfied beyond a reasonable doubt that, by the above-mentioned speeches made in public and in a public place, Akayesu had the intent to directly create a particular state of mind in his audience necessary to lead to the destruction of the Tutsi group, as such. Accordingly, the chamber finds that the said acts constitute the crime of direct and public incitement to commit genocide, as defined above.

In addition, the chamber finds that the direct and public incitement to commit genocide as engaged in by Akayesu, was indeed successful and did lead to the destruction of a great number of Tutsi in the commune of Taba.

(f) Count eleven - Crimes against Humanity (torture)

In the light of its factual findings with regard to the allegations set forth in paragraphs 16, 17, 21, 22 and 23 of the Indictment, the Tribunal considers the criminal responsibility of the accused on count eleven for his acts in relation to the beatings of victims U, V, W, X, Y and Z.

The Tribunal notes that evidence has been presented at trial regarding the beating of victims not specifically named in paragraphs 16, 17, 21, 22 and 23 of the Indictment. Witness J, for example, testified that she was slapped and her brother was beaten by the accused. As counts eleven and twelve are restricted to acts in relation to the beatings of victims U, V, W, X, Y and Z, the Tribunal will restrict its legal findings to these acts.

The Tribunal notes that paragraph 16 of the Indictment alleges that the accused threatened to kill the husband and child of Victim U. The factual finding of the Tribunal is that the accused threatened to kill Victim U, not her husband and child. The Tribunal considers that the allegations set forth in the Indictment sufficiently informed the accused, in accordance with the requirements of due process, of the charge against him. The material allegation is that he threatened Victim U.

Whether the threat was against her life or the life of her immediate family is not legally significant in the Tribunal's view.

The Tribunal notes that paragraph 21 of the Indictment refers to “communal police” without reference to the Interahamwe, although paragraph 23 refers to “men under Jean Paul Akayesu's authority”. In its factual findings, the Tribunal has determined that only Mugenzi was a communal police officer. The other person actively involved in the interrogation and beating of Victim Z and possibly the interrogation of Victim W was Francois, an Interahamwe. As Francois and Mugenzi were both acting in the presence of and under the immediate authority of the accused, as bourgemester, the Tribunal finds that in relation to the accused the acts of Francois may be treated as equivalent to the acts of Mugenzi.

The Tribunal notes that the accused himself participated in the beating of Victim Y by hitting her on the back with a club, and the beating of Victim Z by stepping on his face and holding his foot there while others beat him. It is alleged that he interrogated them but it is not specifically alleged in paragraphs 21 and 23 of the Indictment that the accused committed acts of physical violence. The Tribunal finds, however, that the allegations in the Indictment were sufficient notice to the accused of the incidents in question, and that the exact role of the accused in these incidents was a matter which was adjudicated at trial in accordance with the requirements of due process. For these reasons, the Tribunal finds that the accused may be judged criminally responsible for his direct participation in these beatings, despite the absence of a specific allegation of direct participation by the accused in the relevant paragraphs of the Indictment.

The Tribunal interprets the word “torture”, as set forth in article 3(f) of its Statute, in accordance with the definition of torture set forth in the United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, that is “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”.

The Tribunal finds that the following acts committed by the accused or by others in the presence of the accused, at his instigation or with his consent or acquiescence, constitute torture:

- (a) the interrogation of Victim U, under threat to her life, by the accused at the bureau communal, on 19 April 1994;

- (b) the beating of Victim Y outside of her house by the accused and Mugenzi on 20 April 1994;
- (c) the interrogation of Victim Y, under threat to her life, by the accused, and the beating of Victim Y under interrogation by Mugenzi, in the presence of the accused, at a mine at Buguli on 20 April 1994;
- (d) the interrogation of Victim W, under threat to her life, at a mine at Buguli by the accused, on 20 April 1994;
- (e) the beating of Victim Z under interrogation by the accused, and by Mugenzi and Francois in the presence of the accused, in Gishyeshye Sector, on 20 April 1994;
- (f) the forcing of Victim Z to beat Victim Y under interrogation, by Francois in the presence of the accused, in Gishyeshye Sector, on 20 April 1994;
- (g) the beating of Victim Z and Victim V by Mugenzi and Francois and the interrogation of Victim V, under threat to his life, by the accused outside the house of Victim V, on 20 April 1994;

Accordingly, the Tribunal finds the accused criminally responsible on Count eleven under article 6(1) of its Statute for commission of the following acts of torture as crimes against humanity under article 3(a) of its Statute:

- (a) his interrogation of Victim U, under threat to her life, at the bureau communal on 19 April 1994;
- (b) his beating of Victim Y, outside of her house, on 20 April 1994;
- (c) his interrogation of Victim Y, under threat to her life, at a mine at Buguli on 20 April 1994;
- (d) his interrogation of Victim W, under threat to her life, at a mine at Buguli on 20 April 1994;
- (e) his beating of Victim Z in Gishyeshye Sector, on 20 April 1994;
- (f) his interrogation of Victim V, under threat to his life, outside of his house, on 20 April 1994.

The Tribunal finds the accused criminally responsible on Count eleven under article 6(1) of its Statute for implicitly ordering, as well as instigating, aiding and abetting, the following acts of torture, which were committed in his presence by men acting on his behalf, as crimes against humanity under article 3(a) of its Statute:

- (a) the beating of Victim Y outside of her house by Mugenzi on 20 April 1994;
- (b) the beating of Victim Y, under interrogation, by Mugenzi, at a mine at Buguli on 20 April 1994;

- (c) the beating of Victim Z, under interrogation, by Mugenzi and Francois, in Gishyeshye Sector on 20 April 1994;
- (d) the forcing of Victim Z to beat Victim Y, under interrogation, by Francois, in Gishyeshye Sector on 20 April 1994.

(g) Count thirteen (rape) and Count fourteen (other inhumane acts) – Crimes against Humanity

In the light of its factual findings with regard to the allegations of sexual violence set forth in paragraphs 12A and 12B of the Indictment, the Tribunal considers the criminal responsibility of the accused on count thirteen, crimes against humanity (rape), punishable by article 3(g) of the Statute of the Tribunal and count fourteen, crimes against humanity (other inhumane acts), punishable by article 3(i) of the Statute.

In considering the extent to which acts of sexual violence constitute crimes against humanity under article 3(g) of its Statute, the Tribunal must define rape, as there is no commonly accepted definition of the term in international law. The Tribunal notes that many of the witnesses have used the term “rape” in their testimony. At times, the Prosecution and the defence have also tried to elicit an explicit description of what happened in physical terms, to document what the witnesses mean by the term “rape”. The Tribunal notes that while rape has been historically defined in national jurisdictions as non-consensual sexual intercourse, variations on the form of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual. An act such as that described by Witness KK in her testimony – the Interahamwes thrusting a piece of wood into the sexual organs of a woman as she lay dying – constitutes rape in the Tribunal's view.

The Tribunal considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. The Tribunal also notes the cultural sensitivities involved in public discussion of intimate matters and recalls the painful reluctance and inability of witnesses to disclose graphic anatomical details of sexual violence they endured. The United Nations Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition of torture, focusing rather on the conceptual framework of state-sanctioned violence. The Tribunal finds this approach more useful in the context of international law. Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when it is inflicted by or at the instigation of or with the

consent or acquiescence of a public official or other person acting in an official capacity.

The Tribunal defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact. The incident described by Witness KK in which the accused ordered the Interahamwe to undress a student and force her to do gymnastics naked in the public courtyard of the bureau communal, in front of a crowd, constitutes sexual violence. The Tribunal notes in this context that coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interahamwe among refugee Tutsi women at the bureau communal. Sexual violence falls within the scope of “other inhumane acts”, set forth article 3(i) of the Tribunal's Statute, “outrages upon personal dignity,” set forth in article 4(e) of the Statute, and “serious bodily or mental harm,” set forth in article 2(2)(b) of the Statute.

The Tribunal notes that as set forth by the Prosecution, Counts 13-15 are drawn on the basis of acts as described in paragraphs 12(a) and 12(b) of the Indictment. The allegations in these paragraphs of the Indictment are limited to events which took place “on or near the bureau communal premises.” Many of the beatings, rapes and murders established by the evidence presented took place away from the bureau communal premises, and therefore the Tribunal does not make any legal findings with respect to these incidents pursuant to Counts 13, 14 and 15.

The Tribunal also notes that on the basis of acts described in paragraphs 12(a) and 12(b), the accused is charged only pursuant to article 3(g) (rape) and 3(i) (other inhumane acts) of its Statute, but not article 3(a) (murder) or article 3(f) (torture). Similarly, on the basis of acts described in paragraphs 12(a) and 12(b), the accused is charged only pursuant to article 4(e) (outrages upon personal dignity) of its Statute, and not article 4(a) (violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment). As these paragraphs are not referenced elsewhere in the Indictment in connection with these other relevant articles of the Statute of the Tribunal, the Tribunal concludes that the accused has not been charged with the beatings and killings which have been established as Crimes Against Humanity or Violations of article 3 Common to the Geneva Conventions. The Tribunal notes, however, that paragraphs 12(a) and 12(b) are referenced in Counts one-three, Genocide and it considers the beatings and killings, as well as sexual violence, in connection with those counts.

The Tribunal has found that the accused had reason to know and in fact knew that acts of sexual violence were occurring on or near the premises of the bureau communal and that he took no measures to prevent these acts or punish the perpetrators of them. The Tribunal notes that it is only in consideration of Counts 13, 14 and 15 that the accused is charged with individual criminal responsibility under section 6(3) of its Statute. As set forth in the Indictment, under article 6(3) “an individual is criminally responsible as a superior for the acts of a subordinate if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or punish the perpetrators thereof.” Although the evidence supports a finding that a superior/subordinate relationship existed between the accused and the Interahamwe who were at the bureau communal, the Tribunal notes that there is no allegation in the Indictment that the Interahamwe, who are referred to as “armed local militia,” were subordinates of the accused. This relationship is a fundamental element of the criminal offence set forth in article 6(3). The amendment of the Indictment with additional charges pursuant to article 6(3) could arguably be interpreted as implying an allegation of the command responsibility required by article 6(3). In fairness to the accused, the Tribunal will not make this inference. Therefore, the Tribunal finds that it cannot consider the criminal responsibility of the accused under article 6(3).

The Tribunal finds, under article 6(1) of its Statute, that the accused, by his own words, specifically ordered, instigated, aided and abetted the following acts of sexual violence:

- (a) the multiple acts of rape of ten girls and women, including Witness JJ, by numerous Interahamwe in the cultural center of the bureau communal;
- (b) the rape of Witness OO by an Interahamwe named Antoine in a field near the bureau communal;
- (c) the forced undressing and public marching of Chantal naked at the bureau communal.

The Tribunal finds, under article 6(1) of its Statute, that the accused aided and abetted the following acts of sexual violence, by allowing them to take place on or near the premises of the bureau communal, while he was present on the premises in respect of (i) and in his presence in respect of (ii) and (iii), and by facilitating the commission of these acts through his words of encouragement in other acts of sexual violence, which, by virtue of his authority, sent a clear signal of official tolerance for sexual violence, without which these acts would not have taken place:

- (a) the multiple acts of rape of fifteen girls and women, including Witness JJ, by numerous Interahamwe in the cultural center of the bureau communal;

- (b) the rape of a woman by Interahamwe in between two buildings of the bureau communal, witnessed by Witness NN;
- (c) the forced undressing of the wife of Tharcisse after making her sit in the mud outside the bureau communal, as witnessed by Witness KK;

The Tribunal finds, under article 6(1) of its Statute, that the accused, having had reason to know that sexual violence was occurring, aided and abetted the following acts of sexual violence, by allowing them to take place on or near the premises of the bureau communal and by facilitating the commission of such sexual violence through his words of encouragement in other acts of sexual violence which, by virtue of his authority, sent a clear signal of official tolerance for sexual violence, without which these acts would not have taken place:

- (a) the rape of Witness JJ by an Interahamwe who took her from outside the bureau communal and raped her in a nearby forest;
- (b) the rape of the younger sister of Witness NN by an Interahamwe at the bureau communal;
- (c) the multiple rapes of Alexia, wife of Ntereye, and her two nieces Louise and Nishimwe by Interahamwe near the bureau communal;
- (d) the forced undressing of Alexia, wife of Ntereye, and her two nieces Louise and Nishimwe, and the forcing of the women to perform exercises naked in public near the bureau communal.

The Tribunal has established that a widespread and systematic attack against the civilian ethnic population of Tutsis took place in Taba, and more generally in Rwanda, between April 7 and the end of June 1994. The Tribunal finds that the rape and other inhumane acts which took place on or near the bureau communal premises of Taba were committed as part of this attack.

(h) Count thirteen

The accused is judged criminally responsible under article 3(g) of the Statute for the following incidents of rape:

- (a) the rape of Witness JJ by an Interahamwe who took her from outside the bureau communal and raped her in a nearby forest;
- (b) the multiple acts of rape of fifteen girls and women, including Witness JJ, by numerous Interahamwe in the cultural center of the bureau communal;
- (c) the multiple acts of rape of ten girls and women, including Witness JJ, by numerous Interahamwe in the cultural center of the bureau communal;
- (d) the rape of Witness OO by an Interahamwe named Antoine in a field near the bureau communal;

- (e) the rape of a woman by Interahamwe in between two buildings of the bureau communal, witnessed by Witness NN;
- (f) the rape of the younger sister of Witness NN by an Interahamwe at the bureau communal;
- (g) the multiple rapes of Alexia, wife of Ntereye, and her two nieces Louise and Nishimwe by Interahamwe near the bureau communal.

(i) Count fourteen

The accused is judged criminally responsible under article 3(i) of the Statute for the following other inhumane acts:

- (a) the forced undressing of the wife of Tharcisse outside the bureau communal, after making her sit in the mud, as witnessed by Witness KK;
- (b) the forced undressing and public marching of Chantal naked at the bureau communal;
- (c) the forced undressing of Alexia, wife of Ntereye, and her two nieces Louise and Nishimwe, and the forcing of the women to perform exercises naked in public near the bureau communal.

(j) Count one - Genocide, Count two - Complicity in Genocide

Count one relates to all the events described in the Indictment. The Prosecutor submits that by his acts alleged in paragraphs 12 to 23 of the Indictment, Akayesu committed the crime of genocide, punishable under article 2(3)(a) of the Statute.

Count two also relates to all the acts alleged in paragraphs 12 to 23 of the Indictment. The Prosecutor alleges that, by the said acts, the accused committed the crime of complicity in genocide, punishable under article 2(3)(e) of the Statute.

In its findings on the applicable law, the chamber indicated *supra* that, in its opinion, the crime of genocide and that of complicity in genocide were two distinct crimes, and that the same person could certainly not be both the principal perpetrator of, and accomplice to, the same offence. Given that genocide and complicity in genocide are mutually exclusive by definition, the accused cannot obviously be found guilty of both these crimes for the same act. However, since the Prosecutor has charged the accused with both genocide and complicity in genocide for each of the alleged acts, the chamber deems it necessary, in the instant case, to rule on counts one and two simultaneously, so as to determine, as far as each proven fact is concerned, whether it constituted genocide or complicity in genocide.

Hence the question to be addressed is against which group the genocide was allegedly committed. Although the Prosecutor did not specifically state so in the

Indictment, it is obvious, in the light of the context in which the alleged acts were committed, the testimonies presented and the Prosecutor's closing statement, that the genocide was committed against the Tutsi group. Article 2(2) of the Statute, like the Genocide Convention, provides that genocide may be committed against a national, ethnical, racial or religious group. In its findings on the law applicable to the crime of genocide *supra*, the chamber considered whether the protected groups should be limited to only the four groups specifically mentioned or whether any group, similar to the four groups in terms of its stability and permanence, should also be included. The chamber found that it was necessary, above all, to respect the intent of the drafters of the Genocide Convention which, according to the *travaux préparatoires*, was clearly to protect any stable and permanent group.

In the light of the facts brought to its attention during the trial, the chamber is of the opinion that, in Rwanda in 1994, the Tutsi constituted a group referred to as "ethnic" in official classifications. Thus, the identity cards at the time included a reference to "*ubwoko*" in Kinyarwanda or "*ethnie*" (ethnic group) in French which, depending on the case, referred to the designation Hutu or Tutsi, for example. The chamber further noted that all the Rwandan witnesses who appeared before it invariably answered spontaneously and without hesitation the questions of the Prosecutor regarding their ethnic identity. Accordingly, the chamber finds that, in any case, at the time of the alleged events, the Tutsi did indeed constitute a stable and permanent group and were identified as such by all.

In the light of the foregoing, with respect to each of the acts alleged in the Indictment, the chamber is satisfied beyond reasonable doubt, based on the factual findings it has rendered regarding each of the events described in paragraphs 12 to 23 of the Indictment, of the following:

"The chamber finds that, as pertains to the acts alleged in paragraph 12, it has been established that, throughout the period covered in the Indictment, Akayesu, in his capacity as bourgmestre, was responsible for maintaining law and public order in the commune of Taba and that he had effective authority over the communal police. Moreover, as "leader" of Taba commune, of which he was one of the most prominent figures, the inhabitants respected him and followed his orders. Akayesu himself admitted before the chamber that he had the power to assemble the population and that they obeyed his instructions. It has also been proven that a very large number of Tutsi were killed in Taba between 7 April and the end of June 1994, while Akayesu was bourgmestre of the Commune. Knowing of such killings, he opposed them and attempted to prevent them only until 18 April 1994, date after which he not only stopped trying to maintain law and order in his commune, but was also present during the acts of violence and killings, and sometimes even gave orders himself for bodily or mental harm to be caused to certain Tutsi, and endorsed and even ordered the killing of several Tutsi."

In the opinion of the chamber, the said acts indeed incur the individual criminal responsibility of Akayesu for having ordered, committed, or otherwise aided and

abetted in the preparation or execution of the killing of and causing serious bodily or mental harm to members of the Tutsi group. Indeed, the chamber holds that the fact that Akayesu, as a local authority, failed to oppose such killings and serious bodily or mental harm constituted a form of tacit encouragement, which was compounded by being present to such criminal acts.

With regard to the acts alleged in paragraphs 12(a) and 12(b) of the Indictment, the Prosecutor has shown beyond a reasonable doubt that between 7 April and the end of June 1994, numerous Tutsi who sought refuge at the Taba Bureau communal were frequently beaten by members of the Interahamwe on or near the premises of the Bureau communal. Some of them were killed. Numerous Tutsi women were forced to endure acts of sexual violence, mutilations and rape, often repeatedly, often publicly and often by more than one assailant. Tutsi women were systematically raped, as one female victim testified to by saying that “each time that you met assailants, they raped you”. Numerous incidents of such rape and sexual violence against Tutsi women occurred inside or near the Bureau communal. It has been proven that some communal policemen armed with guns and the accused himself were present while some of these rapes and sexual violence were being committed. Furthermore, it is proven that on several occasions, by his presence, his attitude and his utterances, Akayesu encouraged such acts, one particular witness testifying that Akayesu, addressed the Interahamwe who were committing the rapes and said that “never ask me again what a Tutsi woman tastes like”. In the opinion of the chamber, this constitutes tacit encouragement to the rapes that were being committed.

In the opinion of the chamber, the above-mentioned acts with which Akayesu is charged indeed render him individually criminally responsible for having abetted in the preparation or execution of the killings of members of the Tutsi group and the infliction of serious bodily and mental harm on members of said group.

The chamber found *supra*, with regard to the facts alleged in paragraph 13 of the Indictment, that the Prosecutor failed to demonstrate beyond reasonable doubt that they are established.

As regards the facts alleged in paragraphs 14 and 15 of the Indictment, it is established that in the early hours of 19 April 1994, Akayesu joined a gathering in Gishyeshye and took this opportunity to address the public; he led the meeting and conducted the proceedings. He then called on the population to unite in order to eliminate what he referred to as the sole enemy: the accomplices of the Inkotanyi; and the population understood that he was thus urging them to kill the Tutsi. Indeed, Akayesu himself knew of the impact of his statements on the crowd and of the fact that his call to fight against the accomplices of the Inkotanyi would be understood as exhortations to kill the Tutsi in general. Akayesu who had received from the Interahamwe documents containing lists of names did, in the course of

the said gathering, summarize the contents of same to the crowd by pointing out in particular that the names were those of RPF accomplices. He specifically indicated to the participants that Ephrem Karangwa's name was on of the lists. Akayesu admitted before the chamber that during the period in question, that to publicly label someone as an accomplice of the RPF would put such a person in danger. The statements thus made by Akayesu at that gathering immediately led to widespread killings of Tutsi in Taba.

Concerning the acts with which Akayesu is charged in paragraphs 14 and 15 of the Indictment, the chamber recalls that it has found *supra* that they constitute direct and public incitement to commit genocide, a crime punishable under article 2(3)(c) of the Statute as distinct from the crime of genocide.

With respect to the Prosecutor's allegations in paragraph 16 of the Indictment, the chamber is satisfied beyond a reasonable doubt that on 19 April 1994, Akayesu on two occasions threatened to kill victim U, a Tutsi woman, while she was being interrogated. He detained her for several hours at the Bureau communal, before allowing her to leave. In the evening of 20 April 1994, during a search conducted in the home of victim V, a Hutu man, Akayesu directly threatened to kill the latter. Victim V was thereafter beaten with a stick and the butt of a rifle by a communal policeman called Mugenzi and one Francois, a member of the Interahamwe militia, in the presence of the accused. One of victim V's ribs was broken as a result of the beating.

In the opinion of the chamber, the acts attributed to the accused in connection with victims U and V constitute serious bodily and mental harm inflicted on the two victims. However, while Akayesu does incur individual criminal responsibility by virtue of the acts committed against victim U, a Tutsi, for having committed or otherwise aided and abetted in the infliction of serious bodily and mental harm on a member of the Tutsi group, such acts as committed against victim V were perpetrated against a Hutu and cannot, therefore, constitute a crime of genocide against the Tutsi group.

Regarding the acts alleged in paragraph 17, the Prosecutor has failed to satisfy the chamber that they were proven beyond a reasonable doubt.

As for the allegations made in paragraph 18 of the Indictment, it is established that on or about 19 April 1994, Akayesu and a group of men under his control were looking for Ephrem Karangwa and destroyed his house and that of his mother. They then went to search the house of Ephrem Karangwa's brother-in-law, in Musambira commune and found his three brothers there. When the three brothers, namely Simon Mutijima, Thaddee Uwanyiligira and Jean-Chrysostome, tried to escape, Akayesu ordered that they be captured, and ordered that they be killed, and participated in their killing.

The chamber holds that these acts indeed render Akayesu individually criminally responsible for having ordered, committed, aided and abetted in the preparation or execution of the killings of members of the Tutsi group and the infliction of serious bodily and mental harm on members of said group.

Regarding the allegations in paragraph 19, the chamber is satisfied that it has been established that on or about 19 April 1994, Akayesu took from Taba communal prison eight refugees from Runda commune, handed them over to Interahamwe militiamen and ordered that they be killed. They were killed by the Interahamwe using various traditional weapons, including machetes and small axes, in front of the Bureau communal and in the presence of Akayesu who told the killers “do it quickly”. The refugees were killed because they were Tutsi.

The chamber holds that by virtue of such acts, Akayesu incurs individual criminal liability for having ordered, aided and abetted in the perpetration of the killings of members of the Tutsi group and in the infliction of serious bodily and mental harm on members of said group.

The Prosecutor has proved that, as alleged in paragraph 20 of the Indictment, on that same day, Akayesu ordered the local people to kill intellectuals and to look for one Samuel, a professor who was then brought to the Bureau communal and killed with a machete blow to the neck. Teachers in Taba commune were killed later, on Akayesu's instructions. The victims included the following: Tharcisse Twizeyumuremye, Theogene, Phoebe Uwizeze and her fiancé whose name is unknown. They were killed on the road in front of the Bureau communal by the local people and the Interahamwe with machetes and agricultural tools. Akayesu personally witnessed the killing of Tharcisse.

In the opinion of the chamber, Akayesu is indeed individually criminally responsible by virtue of such acts for having ordered, aided and abetted in the preparation or execution of the killings of members of the Tutsi group and in the infliction of serious bodily and mental harm on members of said group.

The chamber finds that the acts alleged in paragraph 21 have been proven. It has been established that on the evening of 20 April 1994, Akayesu, and two Interahamwe militiamen and a communal policeman, one Mugenzi, who was armed at the time of the events in question, went to the house of Victim Y, a 69 year old Hutu woman, to interrogate her on the whereabouts of Alexia, the wife of Professor Ntereye. During the questioning which took place in the presence of Akayesu, the victim was hit and beaten several times. In particular, she was hit with the barrel of a rifle on the head by the communal policeman. She was forcibly taken away and ordered by Akayesu to lie on the ground. Akayesu himself beat her on her back with a stick. Later on, he had her lie down in front of a vehicle and threatened to drive over her if she failed to give the information he sought.

Although the above acts constitute serious bodily and mental harm inflicted on the victim, the chamber notes that they were committed against a Hutu woman. Consequently, they cannot constitute acts of genocide against the Tutsi group.

As regards the allegations in paragraphs 22 and 23 of the Indictment, the chamber is satisfied beyond reasonable doubt that on the evening of 20 April 1994, in the course of an interrogation, Akayesu forced victim W to lay down in front of a vehicle and threatened to drive over her. That same evening, Akayesu, accompanied by Mugenzi, a communal policeman, and one Francois, an Interahamwe militiaman, interrogated victims Z and Y. The accused put his foot on the face of victim Z, causing the said victim to bleed, while the police officer and the militiaman beat the victim with the butt of their rifles. The militiaman forced victim Z to beat victim Y with a stick. The two victims were tied together, causing victim Z to suffocate. Victim Z was also beaten on the back with the blade of a machete.

The chamber holds that by virtue of the above-mentioned acts Akayesu is individually criminally responsible for having ordered, committed, aided and abetted in the preparation or infliction of serious bodily or mental harm on members of the Tutsi group.

From the foregoing, the chamber is satisfied beyond a reasonable doubt, that Akayesu is individually criminally responsible, under article 6(1) of the Statute, for having ordered, committed or otherwise aided and abetted in the commission of the acts described above in the findings made by the chamber on paragraphs 12, 12A, 12B, 16, 18, 19, 20, 22 and 23 of the Indictment, acts which constitute the killing of members of the Tutsi group and the infliction of serious bodily and mental harm on members of said group.

Since the Prosecutor charged both genocide and complicity in genocide with respect to each of the above-mentioned acts, and since, as indicated *supra*, the chamber is of the opinion that these charges are mutually exclusive, it must rule whether each of such acts constitutes genocide or complicity in genocide.

In this connection, the chamber recalls that, in its findings on the applicable law, it held that an accused is an accomplice to genocide if he or she knowingly and wilfully aided or abetted or instigated another to commit a crime of genocide, while being aware of his genocidal plan, even where the accused had no specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. It also found that article 6(1) of the Statute provides for a form of participation through aiding and abetting which, though akin to the factual elements of complicity, nevertheless entails, in and of itself, the individual responsibility of the accused for the crime of genocide, in particular, where the accused had the specific intent to commit genocide, that is, the intent to destroy a particular group; this latter requirement is not needed where an accomplice to genocide is concerned.

Therefore, it is incumbent upon the chamber to decide, in this instant case, whether or not Akayesu had a specific genocidal intent when he participated in the above-mentioned crimes, that is, the intent to destroy, in whole or in part, a group as such.

As stated in its findings on the law applicable to the crime of genocide, the chamber holds the view that the intent underlying an act can be inferred from a number of facts. The chamber is of the opinion that it is possible to infer the genocidal intention that presided over the commission of a particular act, *inter alia*, from all acts or utterances of the accused, or from the general context in which other culpable acts were perpetrated systematically against the same group, regardless of whether such other acts were committed by the same perpetrator or even by other perpetrators.

First of all, regarding Akayesu's acts and utterances during the period relating to the acts alleged in the Indictment, the chamber is satisfied beyond reasonable doubt, on the basis of all evidence brought to its attention during the trial, that on several occasions the accused made speeches calling, more or less explicitly, for the commission of genocide. The chamber, in particular, held in its findings on Count 4, that the accused incurred individual criminal responsibility for the crime of direct and public incitement to commit genocide. Yet, according to the chamber, the crime of direct and public incitement to commit genocide lies in the intent to directly lead or provoke another to commit genocide, which implies that he who incites to commit genocide also has the specific intent to commit genocide: that is, to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

Furthermore, the chamber has already established that genocide was committed against the Tutsi group in Rwanda in 1994, throughout the period covering the events alleged in the Indictment. Owing to the very high number of atrocities committed against the Tutsi, their widespread nature not only in the commune of Taba, but also throughout Rwanda, and to the fact that the victims were systematically and deliberately selected because they belonged to the Tutsi group, with persons belonging to other groups being excluded, the chamber is also able to infer, beyond reasonable doubt, the genocidal intent of the accused in the commission of the above-mentioned crimes.

With regard, particularly, to the acts described in paragraphs 12(a) and 12(b) of the Indictment, that is, rape and sexual violence, the chamber wishes to underscore the fact that in its opinion, they constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the chamber, one of the worst ways of inflict harm on the victim as he or she suffers both bodily and mental harm. In light of all the evidence

before it, the chamber is satisfied that the acts of rape and sexual violence described above, were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times, often in public, in the Bureau Communal premises or in other public places, and often by more than one assailant. These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.

The rape of Tutsi women was systematic and was perpetrated against all Tutsi women and solely against them. A Tutsi woman, married to a Hutu, testified before the chamber that she was not raped because her ethnic background was unknown. As part of the propaganda campaign geared to mobilizing the Hutu against the Tutsi, the Tutsi women were presented as sexual objects. Indeed, the chamber was told, for an example, that before being raped and killed, Alexia, who was the wife of the Professor, Ntereye, and her two nieces, were forced by the Interahamwe to undress and ordered to run and do exercises “in order to display the thighs of Tutsi women”. The Interahamwe who raped Alexia said, as he threw her on the ground and got on top of her, “let us now see what the vagina of a Tutsi woman tastes like”. As stated above, Akayesu himself, speaking to the Interahamwe who were committing the rapes, said to them: “don't ever ask again what a Tutsi woman tastes like”. This sexualized representation of ethnic identity graphically illustrates that tutsi women were subjected to sexual violence because they were Tutsi. Sexual violence was a step in the process of destruction of the tutsi group – destruction of the spirit, of the will to live, and of life itself.

On the basis of the substantial testimonies brought before it, the chamber finds that in most cases, the rapes of Tutsi women in Taba, were accompanied with the intent to kill those women. Many rapes were perpetrated near mass graves where the women were taken to be killed. A victim testified that Tutsi women caught could be taken away by peasants and men with the promise that they would be collected later to be executed. Following an act of gang rape, a witness heard Akayesu say “tomorrow they will be killed” and they were actually killed. In this respect, it appears clearly to the chamber that the acts of rape and sexual violence, as other acts of serious bodily and mental harm committed against the Tutsi, reflected the determination to make Tutsi women suffer and to mutilate them even before killing them, the intent being to destroy the Tutsi group while inflicting acute suffering on its members in the process.

In light of the foregoing, the chamber finds firstly that the acts described *supra* are indeed acts as enumerated in article 2(2) of the Statute, which constitute the factual elements of the crime of genocide, namely the killings of Tutsi or the serious bodily and mental harm inflicted on the Tutsi. The chamber is further satisfied beyond reasonable doubt that these various acts were committed by

Akayesu with the specific intent to destroy the Tutsi group, as such. Consequently, the chamber is of the opinion that the acts alleged in paragraphs 12, 12A, 12B, 16, 18, 19, 20, 22 and 23 of the Indictment and proven above, constitute the crime of genocide, but not the crime of complicity; hence, the chamber finds Akayesu individually criminally responsible for genocide.

(k) Count three - Crimes against Humanity (extermination)

Count three of the indictment charges the accused with crimes against humanity (extermination), pursuant to article 3(b) of the Statute, for the acts alleged in paragraphs 12 to 23 of the indictment.

The definition of crimes against humanity, including the various elements that comprise the enumerated offences under article 3 of the Statute have already been discussed.

The chamber finds beyond a reasonable doubt that during his search for Ephrem Karangwa on 19 April 1994, the accused participated in the killing of Simon Mutijima, Thaddée Uwanyiligira and Jean Chrysostome, by ordering their deaths and being present when they were killed.

The chamber finds beyond a reasonable doubt that on 19 April 1994, the accused took eight detained refugees and handed them over to the local militia, known as the Interahamwe with orders that they be killed.

The chamber finds beyond a reasonable doubt that the Interahamwe and the local population, acting on the orders of the accused killed five teachers namely; a professor known as Samuel; Tharcisse who was killed in the presence of the accused; Theogene, Phoebe Uwineze and her fiancé.

The chamber finds beyond a reasonable doubt that the eight refugees as well as Simon Mutijima, Thaddée Uwanyiligira, Jean Chrysostome, Samuel, Tharcisse, Theogene, Phoebe Uwineze and her fiancé were all civilians, taking no active part in the hostilities that prevailed in Rwanda in 1994 and the only reason they were killed is because they were Tutsi.

The chamber finds beyond a reasonable doubt that in ordering the killing of the eight refugees as well as Simon Mutijima, Thaddée Uwanyiligira, Jean Chrysostome, Samuel, Tharcisse, Theogene, Phoebe Uwineze and her fiancé, the accused had the requisite intent to cause mass destruction, directed against certain groups of individuals, as part of a widespread or systematic attack against the civilian population of Rwanda on ethnic grounds.

The chamber finds beyond a reasonable doubt that in ordering the killing of the eight refugees as well as Simon Mutijima, Thaddée Uwanyiligira, Jean Chrysostome, Samuel, Tharcisse, Theogene, Phoebe Uwineze and her fiancé, the

accused is individually criminally responsible for the death of these victims, pursuant to article 6(1) of the Statute.

The chamber finds beyond a reasonable doubt that there was a widespread and systematic attack against the civilian population in Rwanda on 19 April 1994 and the conduct of the accused formed part of this attack.

Therefore the chamber finds, beyond a reasonable doubt that the killing of the eight refugees as well as Simon Mutijima, Thaddée Uwanyiligira, Jean Chrysostome, Samuel, Tharcisse, Theogene, Phoebe Uwineze and her fiancé, constitute extermination committed, as part of a widespread or systematic attack on the civilian population on ethnic grounds and as such constitutes a crime against humanity. Accordingly, the chamber finds beyond a reasonable doubt that the accused is guilty as charged in count three of the indictment.

For the appellant:

Information not available

For the repondent:

Information not available

EUROPEAN PARLIAMENT V COUNCIL OF THE EUROPEAN COMMUNITIES

CASE NUMBER C – 70 OF 1988

[1] Measures adopted by the Community institutions – Choice of legal basis – Criteria.

[2] EAEC – Health protection – Safety standards for the protection of the general public and workers – Laying down maximum permitted levels of radioactive contamination of foodstuffs and of feedingstuffs – Prohibition in placing contaminated foodstuffs on the market – Legal basis – Article 31 of EAEC Treaty (EEC Treaty, Article 100(a); EAEC Treaty, Article 31; Council Regulation number 3954/87).

Editor's Summary

By application lodged at the Court Registry on 4 March 1988, the European Parliament brought an action under article 146 of the EAEC Treaty and article 173 of the EEC Treaty for the annulment of Council Regulation (Euratom) Nnumber 3954/87 of 22 December 1987 laying down maximum permitted levels of radioactive contamination of foodstuffs and of feedingstuffs following a nuclear accident or any other case of radiological emergency. That regulation, which was based on article 31 of the EAEC Treaty, laid down the procedure for determining the maximum permitted levels of radioactive contamination of foodstuffs and feedingstuffs which may be placed on the market following a nuclear accident or any other case of radiological emergency which is likely to lead to or has led to significant radioactive contamination of foodstuffs and feedingstuffs. Foodstuffs or feedingstuffs with a level of contamination in excess of the maximum permitted levels laid down in a measure adopted in accordance with the provisions of the regulation at issue may not be placed on the market.

In support of its action the Parliament put forward three pleas, the first of which alleged that the legal basis for the regulation at issue had been wrongly chosen, whilst the second and third pleas claimed respectively that the legal form of the measure in question was inappropriate and that in that measure implementing powers were not delegated to the Commission. Reference was made to the Report for the Hearing for a fuller account of the course of the procedure and the pleas and arguments of the parties.

Held - In the context of the organization of the powers of the Community the choice of the legal basis for a measure may not depend simply on an institution's conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review. Those factors include in particular the aim and content of the measure in question.

The purpose of Regulation number 3954/87 is to establish uniform safety standards to protect the health of workers and of the general public, as provided in article 2(b) of the EAEC Treaty. It lays down maximum permitted levels of radioactive contamination of foodstuffs and of feedingstuffs and requires the Commission to adopt, in the event of a nuclear accident or any other case of radiological emergency, if the circumstances so require, a regulation rendering applicable those maximum permissible levels. Since its purpose is to protect the population against the dangers arising from foodstuffs and feedingstuffs which have undergone radioactive contamination, it was possible for it to be adopted on the basis of article 31 of the EAEC Treaty.

The fact that it also provides for the prohibition of placing on the market foodstuffs and feedingstuffs with a radioactive contamination level in excess of the maximum permitted levels did not make it necessary to have recourse at the same time to article 100(a) of the EEC Treaty. In fact as that prohibition is only one condition for the effectiveness of the application of maximum permitted levels, the regulation has only the incidental effect of harmonizing the conditions for the free movement of goods within the Community by avoiding the adoption of unilateral measures by the various Member States.

Cases referred to in judgment

(“A” means adopted; “AL” means allowed; “AP” means applied; “APP” means approved; “C” means considered; “D” means distinguished; “DA” means disapproved; “DT” means doubted; “E” means explained; “F” means followed; “O” means overruled)

United Kingdom

Commission v Council [1991] ECR I-2867

Parliament v Council [1990] ECR I-2041

Judgment

Having regard to the Report for the Hearing, after hearing oral argument on behalf of the parties at the hearing on 7 May 1991, at which the European Parliament was represented by Jorge Campinos, Johann Schoo, Christian Pennera and Professor Dieter H Scheuing, acting as Agents, the Council by Bernhard Schloh, acting as Agent, the Commission by Juergen Gruenwald, acting as Agent, and the United Kingdom by Gerald Barling, Barrister, acting as Agent.

After hearing the Opinion of the Advocate General at the sitting on 26 June 1991, gives the following Judgment.

By application lodged at the Court Registry on 4 March 1988, the European Parliament brought an action under article 146 of the EAEC Treaty and article 173

of the EEC Treaty for the annulment of Council Regulation (Euratom) number 3954/87 of 22 December 1987 laying down maximum permitted levels of radioactive contamination of foodstuffs and of feedingstuffs following a nuclear accident or any other case of radiological emergency (Official Journal 1987 L 371, page 11).

That regulation, which is based on article 31 of the EAEC Treaty, lays down the procedure for determining the maximum permitted levels of radioactive contamination of foodstuffs and feedingstuffs which may be placed on the market following a nuclear accident or any other case of radiological emergency which is likely to lead to or has led to significant radioactive contamination of foodstuffs and feedingstuffs. Foodstuffs or feedingstuffs with a level of contamination in excess of the maximum permitted levels laid down in a measure adopted in accordance with the provisions of the regulation at issue may not be placed on the market.

By interlocutory judgment of 22 May 1990 in case C-70 of 1988 *Parliament v Council* [1990] ECR I-2041, the Court dismissed the objection of inadmissibility raised by the Council and ordered the proceedings to continue with regard to the substance of the case. In the grounds of judgment in that case the Court held in substance that an action for annulment brought by the Parliament against an act of the Council or the Commission was admissible provided that the action sought only to safeguard the Parliament's prerogatives and it was founded only on submissions alleging their infringement (paragraph 27).

In support of its action the Parliament puts forward three pleas, the first of which alleges that the legal basis for the regulation at issue has been wrongly chosen, whilst the second and third pleas claim respectively that the legal form of the measure in question was inappropriate and that in that measure implementing powers were not delegated to the Commission.

Reference is made to the Report for the Hearing for a fuller account of the course of the procedure and the pleas and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The first plea

By its first plea the Parliament claims in substance that the regulation at issue is wrongly based on article 31 of the EAEC Treaty, whereas the appropriate legal basis would have been article 100(a) of the EEC Treaty, if necessary in conjunction with article 31 of the EAEC Treaty.

It should be recalled in limine, as the Court pointed out in paragraphs 28 to 31 of the interlocutory judgment previously cited, that by claiming that the regulation at issue is based on article 31 of the EAEC Treaty, which provides only that the

Parliament is to be consulted, whereas it ought to have been based on article 100(a) of the EEC Treaty, which requires implementation of the procedure for cooperation with the Parliament, the Parliament is in fact claiming that its prerogatives were breached as a result of the choice of the legal basis. To that extent the application is therefore admissible.

It is therefore necessary to consider whether the regulation at issue could validly be adopted on the basis of article 31 of the EAEC Treaty.

The Court has consistently held that in the context of the organization of the powers of the Community the choice of the legal basis for a measure may not depend simply on an institution's conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review. Those factors include in particular the aim and content of the measure (see, most recently, paragraph 10 of the judgment in case C-300 of 1989 *Commission v Council* [1991] ECR I-2867).

As regards the aim pursued, it may be seen from the first recital in the preamble to Regulation number 3954/87 that the purpose of the regulation is to establish uniform safety standards to protect the health of workers and of the general public, as provided in article 2(b) of the EAEC Treaty. The fifth recital emphasizes in addition the need to "set up a system allowing the Community, following a nuclear accident or any other case of radiological emergency which is likely to lead or has led to a significant radioactive contamination of foodstuffs and feedingstuffs, to fix maximum permitted levels of radioactive contamination in order to protect the population".

As regards the content of the regulation at issue, it should be noted that the annex thereto lays down maximum permitted levels of radioactive contamination for foodstuffs and feedingstuffs. In the event of the Commission's receiving official information on nuclear accidents or on any other case of radiological emergency, substantiating that the said maximum permissible levels are likely to be reached or have been reached, the Commission is immediately to adopt, if the circumstances so require, a regulation rendering applicable those maximum permissible levels (article 2). The Council is either to adapt or confirm, within a period of three months, the provisions of the Commission's regulation (article 3). Regulation number 3954/87 moreover lays down a procedure to be followed for revising or supplementing the maximum permitted levels (article 5).

The foregoing considerations indicate that the purpose of the regulation at issue, according to its aim and content, as they emerge from its actual wording, is to protect the population against the dangers arising from foodstuffs and feedingstuffs which have undergone radioactive contamination.

However, the Parliament contends that article 30 et seq. of the EAEC Treaty, on the one hand, do not relate to so-called "secondary" radiation, that is, radiation

emanating from contaminated products, but, on the other hand, concern only the protection of persons directly involved in the nuclear industry.

There is no support in the relevant legislation for that restrictive interpretation, which cannot therefore be accepted. The indications are rather that the purpose of the articles referred to is to ensure the consistent and effective protection of the health of the general public against the dangers arising from ionizing radiations, whatever their source and whatever the categories of persons exposed to such radiations.

It is also necessary to consider whether, as the Parliament claims in the alternative, Regulation number 3954/87 ought also to have been based on article 100(a) of the EEC Treaty on the ground that it concerns not only the protection of the public against ionizing radiations but also the establishment and functioning of the internal market within the meaning of article 8(a) of the EEC Treaty.

It is true that article 6(1) of the regulation at issue prohibits the placing on the market of foodstuffs and feedingstuffs with a level of radioactive contamination in excess of the maximum permitted levels laid down at Community level and that the 11th recital in the preamble to the regulation states that “the adoption of a regulation rendering applicable maximum permitted levels would also maintain the unity of the Common Market and avoid deflections of trade within the Community”.

However, contrary to the Parliament's view, those factors do not justify the conclusion that the regulation at issue is also a harmonization measure within the meaning of article 100(a) of the EEC Treaty. In fact the prohibition of marketing provided for in article 6(1) is only one condition for the effectiveness of the application of the maximum permitted levels. The regulation therefore has only the incidental effect of harmonizing the conditions for the free movement of goods within the Community inasmuch as, by means of the adoption of uniform protective measures, it avoids the need for trade in foodstuffs and feedingstuffs, which have undergone radioactive contamination to be made the subject of unilateral national measures.

It follows from the foregoing that the contested regulation was validly adopted on the basis of article 31 of the EAEC Treaty alone. The plea alleging that that legal basis was wrongly chosen must therefore be rejected.

The second and third pleas

By its second and third pleas the Parliament claims that on the one hand the Council adopted a regulation, whereas article 31 of the EAEC Treaty allows only the adoption of a directive and, on the other hand, that the Council omitted, in the measure at issue, to delegate implementing powers to the Commission.

In this respect it is sufficient to note that the Parliament has not put forward in support of its pleas any evidence tending to show a breach of its prerogatives. The relevant pleas must therefore be rejected as inadmissible.

Since none of the Parliament's pleas has been successful, the application must be dismissed.

1. DECISION ON COSTS

(a) Costs

Under article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the European Parliament has been unsuccessful, it must be ordered to pay the costs, including those of the parties who intervened in support of the form of order sought by the Council.

(b) Operative part

On those grounds,

The court hereby:

- (1) Dismisses the application;
- (2) Orders the European Parliament to pay the costs, including those of the interveners.

For the appellant:

Information not available

For the respondent:

Information not available

EUROPEAN PARLIAMENT V COUNCIL OF THE EUROPEAN COMMUNITIES

CASE NUMBER C – 70 OF 1988

[1] European Communities – Institutional balance – Implications – Maintenance of the division of powers – Judicial review (EEC Treaty, article 164; EAEC Treaty, article 136).

[2] Action for annulment – Parliament's right to bring such an action restricted to defence of its prerogatives (EEC Treaty, article 173; EAEC Treaty, article 146).

[3] Parliament – Prerogatives – Participation in the legislative process – Restricted by the Council's choice of legal basis for an act of secondary law – Admissibility of Parliament's action for annulment (EEC Treaty, articles 100(a) and 173; EAEC Treaty, articles 31 and 146).

Editor's Summary

By application lodged at the Court Registry on 4 March 1988, the European Parliament brought an action under article 146 of the Euratom Treaty and article 173 of the EEC Treaty for the annulment of Council Regulation (Euratom) number 3954/87 of 22 December 1987 laying down maximum permitted levels of radioactive contamination of foodstuffs and of feedingstuffs following a nuclear accident or any other case of a radiological emergency. That regulation, which was based on article 31 of the Euratom Treaty, laid down the procedure for determining the maximum permitted levels of radioactive contamination of foodstuffs and of feedingstuffs which would be placed on the market following a nuclear accident or any other radiological emergency which could lead or had led to significant radioactive contamination of foodstuffs or feedingstuffs. Foodstuffs or feedingstuffs with a level of contamination in excess of the maximum permitted levels laid down in any measure adopted in accordance with the provisions of the contested regulation could not be placed on the market. The Council raised an objection of inadmissibility under the first subparagraph of article 91(1) of the Rules of Procedure of the Court and asked the Court to rule on that objection without considering the substance of the case

Held – By setting up a system for distributing powers among the different Community institutions, assigning each institution to its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community, the Treaties have created an institutional balance. Observance of that balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions. It also requires that it should be possible to penalize any breach of that rule which may occur. The

Court, which under the Treaties has the task of ensuring that in the interpretation and application of the Treaties the law is observed, must therefore be able to maintain the institutional balance, and in order to do so must be able to review observance of the prerogatives of the various institutions by means of appropriate legal remedies.

Although the Treaties contain no provision giving the Parliament the right to bring an action for annulment, it would be incompatible with the fundamental interest in the maintenance and observance of the institutional balance which they establish for it to be possible to breach the Parliament's prerogatives without that institution being able, like the other institutions, to have recourse to one of the legal remedies provided for by the Treaties which may be exercised in a certain and effective manner. Consequently, an action for annulment brought by the Parliament against an act of the Council or the Commission is admissible provided that the action seeks only to safeguard its prerogatives and that it is founded only on submissions alleging breach of them. Provided that condition is met, the Parliament's action for annulment is subject to the rules laid down in the Treaties for actions for annulment brought by the other institutions.

In accordance with the Treaties, the Parliament's prerogatives include participation in the drafting of legislative measures, in particular participation in the cooperation procedure laid down in the EEC Treaty. Since the compulsory initiation of that procedure, which enables the Parliament to participate in the legislative process more closely and actively than it could in the consultation procedure, depends on the legal basis on which the measure to be adopted will be based, an action for the annulment of an act adopted by the Council brought by the Parliament on the ground that the Council has breached the Parliament's prerogatives by choosing a legal basis other than that required by the Treaty must be held to be admissible.

Case referred to in Judgment

("A" means adopted; "AL" means allowed; "AP" means applied; "APP" means approved; "C" means considered; "D" means distinguished; "DA" means disapproved; "DT" means doubted; "E" means explained; "F" means followed; "O" means overruled)

United Kingdom

European Parliament v Council [1988] ECR 5615

Judgment

After hearing the arguments of the parties at the hearing on 5 October 1989, at which the European Parliament was represented by Francesco Pasetti

Bombardella, Christian Pennera and Johann Schoo, assisted by Michel Waelbroeck, of the Brussels Bar, the Council by Raffaello Fornasier and Bernhard Schloh, and the Commission by Jean-Louis Dewost, Director-General of its Legal Department, assisted by Denise Sorasio, Legal Adviser, acting as Agents.

After hearing the Opinion of the Advocate General delivered at the sitting on 30 November 1989, the court gives the following Judgment

Grounds

By application lodged at the Court Registry on 4 March 1988, the European Parliament brought an action under article 146 of the Euratom Treaty and article 173 of the EEC Treaty for the annulment of Council Regulation (Euratom) number 3954/87 of 22 December 1987 laying down maximum permitted levels of radioactive contamination of foodstuffs and of feedingstuffs following a nuclear accident or any other case of a radiological emergency (Official Journal 1987, L 371, page 11).

That regulation, which is based on article 31 of the Euratom Treaty, lays down the procedure for determining the maximum permitted levels of radioactive contamination of foodstuffs and of feedingstuffs which may be placed on the market following a nuclear accident or any other radiological emergency which could lead or has led to significant radioactive contamination of foodstuffs or feedingstuffs. Foodstuffs or feedingstuffs with a level of contamination in excess of the maximum permitted levels laid down in any measure adopted in accordance with the provisions of the contested regulation may not be placed on the market.

During the drafting of the contested regulation, the European Parliament, which was consulted by the Council in accordance with article 31 of the Euratom Treaty, stated that it did not agree with the legal basis adopted by the Commission and asked the Commission to submit to it a new proposal based on article 100(a) of the EEC Treaty. Since the Commission did not comply with that request the Council adopted Regulation number 3954/87 on the basis of article 31 of the Euratom Treaty. The Parliament then brought the present action for the annulment of that regulation.

The Council raised an objection of inadmissibility under the first subparagraph of article 91(1) of the Rules of Procedure of the Court and asked the Court to rule on that objection without considering the substance of the case.

In the written procedure, before delivery of the judgment of 27 September 1988 in case 302 of 1987 *European Parliament v Council* [1988] ECR 5615 ("Comitology"), the Council put forward in support of its objection of inadmissibility arguments which were similar to those which it had put forward in

support of its objection of inadmissibility in case 302 of 1987. At the hearing, which took place on 5 October 1989, the Council claimed that the question of the European Parliament's capacity to bring an action for annulment had been clearly decided by the Court in its judgment in case 302 of 1987 and that the present action was therefore inadmissible.

The European Parliament asked the Court to dismiss the objection. It claimed that a new factor distinguished the present case from case 302 of 1987. According to the Parliament, in order to justify its refusal in that case to recognize the European Parliament's capacity to bring an action for annulment the Court pointed out that it was the responsibility of the Commission under article 155 of the EEC Treaty to ensure that the Parliament's prerogatives were respected and to bring any actions for annulment which might be necessary for that purpose. However, the present case shows that the Commission cannot fulfil that responsibility since it chose a legal basis for its proposal which was different from the legal basis which the Parliament considered appropriate. Consequently, the Parliament cannot rely on the Commission to defend its prerogatives by bringing an action for annulment.

The European Parliament added that the Council's adoption of the contested measure cannot be regarded as an implied refusal to act which would enable the Parliament to bring an action for failure to act. Moreover, the defence of its prerogatives by actions brought by individuals would be completely fortuitous and therefore ineffective.

Therefore, according to the Parliament, there is a legal vacuum which the Court must fill by recognizing that the European Parliament has capacity to bring an action for annulment, but only to the extent necessary to safeguard its own prerogatives.

By order of 13 July 1988, the Commission of the European Communities was granted leave to intervene in support of the defendant's conclusions. Although the Commission concluded that the application should be dismissed on the merits, at the hearing it asked the Court to dismiss the Council's objection of inadmissibility. By order of 18 January 1989, the United Kingdom was granted leave to intervene in support of the defendant. The United Kingdom made no submission with regard to the admissibility of the action.

Reference is made to the Report for the Hearing for a fuller account of the facts, the course of the procedure and the submissions and arguments of the parties, which are mentioned hereinafter only in so far as is necessary for the reasoning of the Court.

It must be observed as a preliminary point that since the contested measure is based on a provision of the Euratom Treaty, the admissibility of the action for the annulment of that measure must be examined with regard to that Treaty.

As is evident from the judgment in case 302 of 1987, cited above, the Parliament does not have the right to bring an action for annulment under article 173 of the EEC Treaty or under article 146 of the Euratom Treaty, which are identical in content.

First of all, in the first paragraph of article 173 or article 146, the Parliament is not included among the institutions which, like the Member States, can bring an action for annulment against any measure of another institution.

Furthermore, since the Parliament is not a legal person it cannot bring an action before the Court under the second paragraph of the articles in question, the scheme of which would, in any event, be inappropriate to an action for annulment brought by the Parliament.

In the judgment in case 302 of 1987, after having stated the reasons why the Parliament did not have capacity to bring an action under article 173 of the EEC Treaty, the Court pointed out that various legal remedies were available to ensure that the Parliament's prerogatives were defended. As was observed in that judgment, not only does the Parliament have the right to bring an action for failure to act, but the Treaties provide means for submitting for review by the Court acts of the Council or the Commission adopted in disregard of the Parliament's prerogatives.

However, the circumstances and arguments adduced in the present case show that the various legal remedies provided for both in the Euratom Treaty and in the EEC Treaty, however effective and diverse they may be, may prove to be ineffective or uncertain.

First, an action for failure to act cannot be used to challenge the legal basis of a measure which has already been adopted.

Secondly, the submission of a reference for a preliminary ruling on the validity of such an act or the bringing of an action by Member States or individuals for the annulment of the act are mere contingencies, and the Parliament cannot be sure that they will materialize.

Finally, while the Commission is required to ensure that the Parliament's prerogatives are respected, that duty cannot go so far as to oblige it to adopt the Parliament's position and bring an action for annulment which the Commission itself considers unfounded.

It follows from the foregoing that the existence of those various legal remedies is not sufficient to guarantee, with certainty and in all circumstances, that a measure adopted by the Council or the Commission in disregard of the Parliament's prerogatives will be reviewed.

Those prerogatives are one of the elements of the institutional balance created by the Treaties. The Treaties set up a system for distributing powers among the different Community institutions, assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community.

Observance of the institutional balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions. It also requires that it should be possible to penalize any breach of that rule which may occur.

The Court, which under the Treaties has the task of ensuring that in the interpretation and application of the Treaties the law is observed, must therefore be able to maintain the institutional balance and, consequently, review the observance of the Parliament's prerogatives when called upon to do so by the Parliament, by means of a legal remedy which is suited to the purpose which the Parliament seeks to achieve.

In carrying out that task the Court cannot, of course, include the Parliament among the institutions which may bring an action under article 173 of the EEC Treaty or article 146 of the Euratom Treaty without being required to demonstrate an interest in bringing an action.

However, it is the Court's duty to ensure that the provisions of the Treaties concerning the institutional balance are fully applied and to see to it that the Parliament's prerogatives, like those of the other institutions, cannot be breached without it having available a legal remedy, among those laid down in the Treaties, which may be exercised in a certain and effective manner.

The absence in the Treaties of any provision giving the Parliament the right to bring an action for annulment may constitute a procedural gap, but it cannot prevail over the fundamental interest in the maintenance and observance of the institutional balance laid down in the Treaties establishing the European Communities.

Consequently, an action for annulment brought by the Parliament against an act of the Council or the Commission is admissible provided that the action seeks only to safeguard its prerogatives and that it is founded only on submissions alleging their infringement. Provided that condition is met, the Parliament's action for annulment is subject to the rules laid down in the Treaties for actions for annulment brought by the other institutions.

In accordance with the Treaties, the Parliament's prerogatives include participation in the drafting of legislative measures, in particular participation in the cooperation procedure laid down in the EEC Treaty.

In the present case, the Parliament claims that the contested regulation is based on article 31 of the Euratom Treaty, which provides only that the Parliament is to

be consulted, whereas it ought to have been based on article 100(a) of the EEC Treaty, which requires implementation of the procedure for cooperation with the Parliament.

The Parliament infers from that that the Council's choice of legal basis for the contested regulation led to a breach of its prerogatives by denying it the possibility, which the cooperation procedure offers, of participating in the drafting of the measure more closely and actively than it could in the consultation procedure.

Since the Parliament claims that its prerogatives were breached as a result of the choice of legal basis for the contested measure, it follows from all the foregoing that the present action is admissible. The Council's objection of inadmissibility must therefore be dismissed and the proceedings must be continued with regard to the substance of the case.

Decision on costs

(a) Costs

The costs must be reserved.

(b) Operative part

On those grounds,

The court hereby:

- (1) Dismisses the objection of inadmissibility raised by the Council;
- (2) Orders the proceedings to continue with regard to the substance of the case;
- (3) Reserves costs.

For the appellant:

Information not available

For the respondent:

Information not available

EAST AFRICAN LAW SOCIETY AND OTHERS V ATTORNEY GENERAL OF THE REPUBLIC OF KENYA AND OTHERS

THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

**APPLICATION NUMBER 9 OF 2007
ARISING OUT OF REFERENCE NUMBER 3 OF 2007**

Editor's Summary

The essence of the Reference before the court was to the effect that the amendments of the Treaty and ratification thereof by the three Partner States, namely the Republic of Kenya (first respondent); the United Republic of Tanzania (second respondent) and the Republic of Uganda (third respondent) were illegal, unconstitutional and of no legal effect since they were made in contravention of articles 150 and 38 of the Treaty. The applicants therefore sought from the Court the remedies in the nature of: (1) A Declaration that the process of amendment of the Treaty infringes articles 5, 6, 7, 8, 9, 11, 38 and 150 of the Treaty, as well as peremptory norms of international law; (2) A Declaration that amendment of the Treaty shall incorporate public consultation and participation, in the same manner that was employed in negotiating the Treaty and the various Protocols under it, especially the Protocol on the Establishment of the East African Community Customs Union; (3) A Declaration that the entire process of amendment of the Treaty to date is unlawful and of no legal effect; (4) A Declaration that the purported ratification processes for the said Treaty Amendments employed by the Republic of Kenya, Republic of Uganda and the United Republic of Tanzania are illegal, unconstitutional and of no legal effect; (5) An Order that the Partner States cannot amend the Treaty without commencing a fresh process, as provided for under article 150 of the Treaty; (6) An Order that the cost of and incidental to this Treaty Reference Application be met by the respondents;

The Reference was filed on 18 May 2007 together with this application which was *ex parte* by Notice of Motion for interim orders, *inter alia*, that pending the hearing and final determination of the Reference, the Honourable Court be pleased to restrain and prohibit the first, second, third, and fourth respondents from formulating, publishing, enacting, ratifying, or otherwise howsoever purporting to implement the proposed amendments to the Treaty for the Establishment of the East African Community that were commenced pursuant to the Official Communiqué of the Summit of Heads of State of the East African Community that was issued on or about 30 November 2006.

Held - According to the traditional view of *locus standi*, only an aggrieved person, that is, one who has a more particular or peculiar interest of his own beyond that of the general public, can access the Court to have his rights vindicated. *SP Gupta v Union of India* AIR 1982 SC 149 and *Ex parte Sidebotham* [1880] 14 Ch D 458) referred to.

Despite this apparent rigidity in the rule, Courts have somewhat relaxed the rule as to *locus standi*. *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Limited* [1982] AC 617; *Janata Dal v HS Chowdhary* AIR 1993 SC 892; *Reverend Christopher Mtikila v The Attorney General* [1995] TLR 31; *Professor Peter Anyang' Nyong'o and others v The Attorney General of Kenya and others* East African Court of Justice Reference number 1 of 2006 followed.

The applicants herein are Bar Associations in their respective Partner States and have a duty to promote adherence to the rule of law. We are therefore satisfied that the applicants are genuinely interested in the matter complained of, that is, the alleged non-observance of the Treaty by the respondents. We therefore hold that the applicants have *locus standi* to make this application.

Various articles in the Treaty including article 30 create special causes of action which different parties may refer to this Court for adjudication.

From the application before court, the interpretation of article 150 of the Treaty establishing the East African Community would be a subject-matter of contest during the hearing of the Reference. The totality of the facts in the affidavits disclosed *bona fides* serious issues to be tried by the Court. The applicants had made out a serious question to be tried which if not controverted, would entitle the applicants to succeed in respect of a number of their prayers.

It is evident that the impugned amendments to the Treaty have now been implemented save perhaps the appointment to Judges of the reconstituted Court of Justice. What has been done so far, even if it were unlawful, cannot be undone in these interlocutory proceedings. Whatever remains to be done by way of operationalization can be rectified if the amendments are in the end declared illegal by this Court.

Cases referred to in ruling

(“A” means adopted; “AL” means allowed; “AP” means applied; “APP” means approved; “C” means considered; “D” means distinguished; “DA” means disapproved; “DT” means doubted; “E” means explained; “F” means followed; “O” means overruled)

East Africa

Auto Garage v Motokov (number 3) [1971] EA 514

Giella v Cassman Brown and Company Limited [1973] EA 358

Kenya Commercial Finance Company Limited v Afraha Education Society [2001] I EA 86

Professor Peter Anyang' Nyongo and others v The Attorney General of Kenya and others

East African Court of Justice Reference number 1 of 2006 (UR) – F

Reverend Christopher Mtikila v The Attorney General [1995] TLR 31 – F

United Kingdom

Ex-parte Sidebotham [1880] 14 Ch D 458

Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Limited [1982] AC 617 – F

India

Janata Dal v HS Chowdhary AIR 1993 SC 892

SP Gupta v Union of India AIR 1982 SC 149

Ruling

KEIWUA P, MULENGA, MULWA, ARACH-AMOKO AND NSEKELA JJ: The above mentioned applicants have brought Reference number 3 of 2007 under articles 1, 4, 5, 6, 7, 8, 9, 11, 27, 30, 38 and 150 of the Treaty for the Establishment of the East African Community (the Treaty); and Rules 1(2) and 20 of the East African Court of Justice Rules of Procedure. The Reference is supported by an affidavit sworn by Tom Odhiambo Ojienda, President of the East African Law Society (first applicant). The essence of the Reference is to the effect that the amendments of the Treaty and ratification thereof by the three Partner States, namely the Republic of Kenya (first respondent); the United Republic of Tanzania (second respondent) and the Republic of Uganda (third respondent) are illegal, unconstitutional and of no legal effect since they were made in contravention of articles 150 and 38 of the Treaty. The applicants are therefore seeking from the Court the following prayers:

- “(1) Declaration that the process of amendment of the Treaty infringes articles 5, 6, 7, 8, 9, 11, 38 and 150 of the Treaty, as well as peremptory norms of international law;
- (2) Declaration that amendment of the Treaty shall incorporate public consultation and participation, in the same manner that was employed in negotiating the Treaty and the various Protocols under it, especially the Protocol on the Establishment of the East African Community Customs Union;
- (3) Declaration that the entire process of amendment of the Treaty to date is unlawful and of no legal effect;

- (4) Declaration that the purported ratification processes for the said Treaty Amendments employed by the Republic of Kenya, Republic of Uganda and the United Republic of Tanzania are illegal, unconstitutional and of no legal effect;
- (5) Order that the Partner States cannot amend the Treaty without commencing a fresh process, as provided for under article 150 of the Treaty;
- (6) Order that the cost of and incidental to this Treaty Reference Application be met by the respondents;
- (7) That this Honourable Court be pleased to make such further or other orders as may be necessary in the circumstances."

The Reference was filed on 18 May 2007 together with this application which was *ex parte* by Notice of Motion for interim orders, *inter alia*, that:

"Pending the hearing and final determination of the instant Reference, this Honourable Court be pleased to restrain and prohibit the first, second, third and fourth respondents from formulating, publishing, enacting, ratifying, or otherwise howsoever purporting to implement the proposed amendments to the Treaty for the Establishment of the East African Community that were commenced pursuant to the Official Communiqué of the Summit of Heads of State of the East African Community that was issued on or about 30 November 2006."

In order to strike a balance between the need to hear the application expeditiously with the need to hear all the parties in view of the gravity of the issues raised in the application, the Court on its own motion directed that the application be heard *inter partes* and abridged the time for filing replies.

At the hearing of the application, Professor Ssepembwa outlined the principles that normally guide courts when called upon to decide whether or not to grant the injunctive order sought. He submitted that the applicant should first establish a *prima facie* case with a probability of success. On this point, he contended that the Reference raises more than a *prima facie* case. The issue involved was the correct interpretation of article 150 of the Treaty on the procedure to be followed when amending the Treaty. He added that even the respondents in their replying affidavits sworn by Ms Njeri Mwangi, for the first respondent; Mr Martin Mwambutsya for the third respondent and Ambassador Julius Baker Onen, for the fourth respondent, had raised the same issue, but the parties are poles apart as regards the exact interpretation of article 150 of the Treaty. The second issue in contention is the applicants' claim that the respondents were in breach of article 38 of the Treaty. The applicants allege that the respondents proceeded on the amendment of the Treaty despite the fact that the matter was still pending in Court. In his view the first principle that there was a serious case before the Court had been established, but given the nature of the application before the Court, he did not go into the merits of the case at this juncture.

As regards the second principle, Professor Ssempebwa submitted that the Reference was essentially a public interest litigation which seeks to ensure the observance of the Treaty in the interest of the citizens of East Africa. He submitted that if the amendments are implemented, they will cause irreparable injury particularly to the East African Court of Justice. Professor Ssempebwa pointed out that under the amendments, the current decisions of the Court will be deemed to be decisions of the First Instance Division of the Court and therefore subject to appeal to the appellate Division of the Court. Such a course of action will be extremely unfair and could cause irreparable harm and interfere with the smooth operation of organs and institutions of the East African Community. He also submitted that the amendment to article 30 of the Treaty would curtail the jurisdiction of the Court thereby rendering it almost impotent, as he put it. There was also the question of the limitation period of two months now proposed in the amendments. The cumulative effect of all these amendments is that they would cause irreparable harm to the smooth operation of the Court to the prejudice of the people of East Africa.

Learned Counsel for the respondents strongly resisted the application for an interim injunctive order. From their respective replying affidavits and the oral submissions of Ms Kimani; Mr Mwaimu; Mr Oluka and Mr Kaahwa, three issues stand out, namely; (i) that the applicants have not disclosed any cause of action against any of the respondents; (ii) that the applicants have not established the conditions essential to move the Court to grant the order sought and (iii) that the application has been overtaken by events since the challenged amendments have already come into force.

It is the contention of the respondents that the applicants have not shown what rights or interest were violated or infringed upon. The two affidavits in support of the Notice of Motion were couched in generalities without disclosing the nature of the specific injury that was personal to them and which has been infringed under the Treaty. What the respondents are saying in effect is that the applicants have no *locus standi* to institute the Reference before the Court. They have not shown what legal right has been violated and that the respondents are liable for that violation. On the other hand, Professor Ssempebwa submitted that the respondents in purporting to amend the Treaty contravened article 150, thus depriving the rights of East Africans to participate in the process. Consequently the applicants had the obligation to access the Court to stop this breach of article 150 of the Treaty, among others.

Our starting point in this regard is the traditional view on *locus standi*. In the landmark Indian case of *SP Gupta v Union of India* AIR 1982 SC 149. Bhagwati, J in the course of his judgment stated as follows at page 185:

“The traditional rule in regard to *locus standi* is that judicial redress is available only to a person who has suffered a legal injury of violation of his legal right or legally protected interest by the impugned action of the state or a public authority or any other person or

who is likely to suffer a legal injury by reason of threatened violation of his legal right or legally protected interest by any such action. The basis of entitlement to judicial redress is personal injury to property, body, mind or reputation arising from violation, actual or threatened, of the legal right or legally protected interest of the person seeking such redress. This is a rule of ancient vintage and it arose during an era when private law dominated the legal scene and public law had not yet been born.”

The learned judge continued at page 190 as follows:

“If no one can maintain an action for redress of such public or public injury, it would be disastrous for the rule of law, for it would be open to the State or a public authority to act with impunity beyond the scope of its power or in breach of a public duty owed to it. The Courts cannot countenance such a situation where observance of the law is left to the sweet will of the authority bound by it, without any redress if the law is contravened.”

According to the traditional view of *locus standi* as well explained above, only an aggrieved person, that is, one who has a more particular or peculiar interest of his own beyond that of the general public, can access the Court to have his rights vindicated. (See also: *Ex-parte Sidebotham* [1880] 14 Ch D 458). Despite this apparent rigidity in the rule, Courts have somewhat relaxed the rule. For instance, in the case of *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Limited* [1982] AC 617, Lord Diplock had this to say at page 644 E:

“It would in my view be a grave lacuna in our system of public law if a pressure group like the federation or even a single spirited taxpayer, were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the Court to vindicate the rule of law and get the unlawful conduct stopped.”

From India again, in the case of *Janata Dal v HS Chowdhary* AIR 1993 SC 892, the Court stated at paragraph 62:

“... the strict rule of *locus standi* applicable to private litigation is relaxed and a broad rule is evolved which gives the right of *locus standi* to any member of the public acting *bona fide* and having sufficient interest in instituting an action for redressal of public wrong or public injury but who is not a mere busybody or a meddlesome interloper; since the dominant object of PIL is to ensure observance of the provisions of the Constitution or the law which can be best achieved to advance the cause of the Community ... or public interest by permitting any person, having no personal gain or private motivation or any other oblique consideration, but acting *bona fide* and having sufficient interest in maintaining an action for judicial redress for public injury to put the judicial machinery in; motion like action popularise of Roman Law whereby any citizen could bring such an action in respect of public delict.”

Similar sentiments were echoed by Lugakingira J in the High Court of Tanzania in the case of *Reverend Christopher Mtikila v The Attorney General* [1995] TLR 31 at page 45 where he stated:

“I hasten to emphasize, however, that standing will be granted on the basis of public interest litigation where the petition is *bona fide* and evidently for the public good and where the Court can provide an effective remedy.”

In our recent decision in Reference number 1 of 2006, *Professor Peter Anyang' Nyongo and others v The Attorney General of Kenya and others* (UR), we had occasion to explain what is a common law cause of action, and cited the case of *Auto Garage v Motokov* (number 3) [1971] EA 514. We also stated that various articles in the Treaty including article 30 create special causes of action, which different parties may refer to this Court for adjudication. The applicants herein are Bar Associations in their respective Partner States and have a duty to promote adherence to the rule of law. We are therefore satisfied that the applicants are genuinely interested in the matter complained of, that is, the alleged non-observance of the Treaty by the respondents. We therefore hold that the applicants have *locus standi* to make this application.

This takes us to the second issue. The conditions for the grant of an interlocutory injunction were stated in the oft-cited case of *Giella v Cassman Brown and Company Limited* [1973] EA 358. Spry, VP stated as follows at page 360 E:

“The conditions for the grant of an interlocutory injunction are now well settled in East Africa. First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt it will decide the case on the balance of convenience.” (Followed in *Kenya Commercial Finance Company Limited v Afraha Education Society* [2001] 1 EA 86 at page 89d).

From the applicant's affidavits in support of the Notice of Motion, the replying affidavits of the respondents and the oral submission of the learned Counsel representing the parties, it is evident that the interpretation of article 150 of the Treaty will be a subject-matter of contest during the hearing of the Reference. We are satisfied that the totality of the facts in the affidavits discloses *bona fide* serious issues to be tried by the Court. At this stage we must refrain from making any determination on the merits of the application or any defence to it. Despite this limitation, however, we are satisfied that the applicants have made out a serious question to be tried which if not controverted, might entitle the applicants to succeed in respect of a number of their prayers. The applicants have therefore crossed over the first hurdle.

The second pre-condition is that the Courts' intervention is necessary to protect the applicants from the kind of injury which may be irreparable and which cannot be compensated by way of damages in the event the application is refused. Professor Ssempebwa submitted that this was public interest litigation and therefore it was not possible to show personal loss or injury to the applicants. The aim of the Reference is to ensure the observance of the provisions of the Treaty. We have

read the affidavits of Mr Tom Odhiambo Ojienda, Mr Alute Simon Mughwai and the replying affidavits. It is evident that the impugned amendments to the Treaty have now been implemented save perhaps the appointment to Judges of the reconstituted Court of Justice. What has been done so far, even if it were unlawful, cannot be undone in these interlocutory proceedings. Whatever remains to be done by way of operationalization can be rectified if the amendments are in the end declared illegal by this Court.

In the result and for the foregoing reasons, we dismiss the application for injunction. Costs to be in the cause.

For the appellant:

Information not available

For the respondent:

Information not available

EALS Practice Manual Series - Number 5

The Jurisprudence on Regional and International Tribunals Digest

The Jurisprudence on Regional and International Tribunals Digest is borne out of the recent developments in the judicial arena of the East African Community and other inter-state arrangements where matters are increasingly getting litigated and determined at the international fora.

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